

DE CONCORDIA INTER CODICES: VERS UNE HARMONISATION ENTRE LE CODE LATIN ET LE CODE ORIENTAL*

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RÉSUMÉ — Dans la lettre apostolique *De concordia inter Codices*, le pape François exprime sa constante sollicitude pour la concordance des deux Codes de l'Église catholique. Dans le préambule et les autres articles de la lettre, Sa Sainteté a modifié quelques normes latines, réalisant ainsi une plus grande harmonie entre les Codes latin et oriental. En dépit de son souci pour un certain degré d'harmonie entre les Codes, le pape reconnaît aussi qu'ils ont leurs propres particularités qui les rendent mutuellement indépendants. Ainsi, bien que *De concordia inter Codices* harmonise un bon nombre de normes parallèles dans les deux Codes, d'autres sont encore discordantes puisque le *motu proprio* a pris en considération les différentes traditions de ces deux Codes de l'Église universelle qui demeurent néanmoins séparés et distincts. En référant directement aux articles de *De concordia inter Codices*, la première partie de cet article examine l'harmonie atteinte entre des normes parallèles des Codes latin et oriental. Puis, la deuxième partie considère plusieurs questions non résolues qui ont été soulevées lors de la promulgation du *motu proprio*. Puisque ces difficultés demeurent, l'harmonisation continue des Codes pourrait s'avérer nécessaire pour atteindre une plus grande clarté et pour fournir des réponses faisant foi sur ces questions.

SUMMARY — In his apostolic letter, *De concordia inter Codices*, Pope Francis expressed his constant solicitude for a concordance between the two Codes of the Catholic Church. By way of the letter's Preamble and eleven articles, His Holiness made changes to a number of Latin norms

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thereby effecting a greater harmony between the Latin and Eastern Codes. Despite the pope's concern for an appropriate degree of harmony between the Codes, he also acknowledged that the Codes have their own peculiarities which make them mutually independent. As a result, while *De concordia inter Codices* harmonizes a number of parallel norms of the Codes, others remain disharmonious as the *motu proprio* took into consideration the different traditions behind the two separate and distinct Codes of the universal Church. With specific reference to the articles of *De concordia inter Codices*, part 1 of this paper endeavours to examine the harmony achieved between parallel norms of the Latin and Eastern Codes. Then, part 2 considers several unresolved questions raised as a result of the publication of the *motu proprio*. As these issues remain, continuing harmonization of the Codes may be required to provide greater clarity and authoritative answers to these matters.

Introduction

Dans sa lettre apostolique en forme de *motu proprio* intitulée *De Concordia inter Codices*, le pape François a manifesté sa préoccupation incessante d'en arriver à une concordance entre les deux Codes de l'Église catholique¹. Au moyen d'un Préambule et de onze articles, le Saint-Père a apporté des changements à un certain nombre de normes latines, réalisant ainsi une plus grande harmonie entre le Code de droit canonique latin (*CIC*) et le Code des canons des Églises orientales (*CCEO*)², et ce avant tout, pour des raisons pastorales. Malgré le souci du pape d'en arriver à un degré de concordance adéquat entre les Codes, il a également reconnu que ceux-ci possédaient leur originalité propre qui les rendait mutuellement indépendants. Conséquemment, même si *De Concordia inter Codices* harmonisait un certain nombre de leurs normes parallèles, d'autres demeuraient discordantes, car le *motu proprio* se devait de considérer les différentes traditions derrière les deux Codes séparés et distincts de l'Église universelle. À cet égard, la lettre

¹ Une traduction française du Préambule du *De Concordia inter Codices* et de ses onze articles se trouvent dans l'annexe au présent article. La version française du Préambule du *motu proprio* est du traducteur, alors que la traduction anglaise de ses articles et des normes révisées du *CIC* a été préparée par le R.P. Becket Soule, o.p. et Mgr John A. Renken. La version française des articles est du traducteur. Les textes officiels en latin et en italien se trouve à : http://w2.vatican.va/content/francesco/la/motu-proprio/documents/papa-francesco-motu-proprio_201605_de-concordia-inter-codices.html/.

² Pour un commentaire du Préambule et des articles du *motu proprio*, voir J. ABBASS, « *De concordia inter Codices* : A Commentary », *StC*, 50 (2016), 323-345.

apostolique semble établir des limites dans l'application du Code oriental à l'Église latine³.

En ce qui concerne particulièrement les articles du *De Concordia inter Codices*, la 1^{ère} Partie de cette étude se propose d'examiner la concordance qui a été réalisée entre les normes parallèles du Code latin et du Code oriental. La 2^{ème} Partie examine ensuite quelques questions non résolues qui ont été soulevées à la suite de la publication du *motu proprio*. Ces problèmes persistent et constituent un certain manque d'harmonie entre les deux Codes de l'Église. Il est certain que les arguments développés en 2^{ème} Partie ne veulent en aucune façon conditionner le législateur ou ceux à qui il a conféré le pouvoir d'interpréter authentiquement les lois (CCEO c. 1498, §1; CIC c. 16, §1).

1 — Vers une harmonisation des Codes

1.1 — Inscription des enfants à une Église *sui iuris* (CCEO c. 29, §1; CIC c. 111, §§1-2)⁴

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| <p>CCEO can. 29 §1 – L'enfant qui n'a pas encore atteint l'âge de quatorze ans accomplis est inscrit par le baptême à l'Église <i>sui iuris</i> à laquelle est inscrit le père catholique; si toutefois seule la mère est catholique, ou si les deux parents le demandent d'un commun accord, il est inscrit à l'Église <i>sui iuris</i> à laquelle appartient la mère, restant sauf le droit particulier établi par le Siège Apostolique.</p> | <p>CIC can. 111§1 – Par la réception du baptême, les enfants dont les parents relèvent de l'Église latine sont inscrits à cette Église; il en est de même si l'un des parents n'en relève pas, mais qu'ils aient choisi tous deux d'un commun accord de faire baptiser leur enfant dans l'Église latine; en cas de désaccord, l'enfant est inscrit à l'Église <i>sui iuris</i> dont relève le père.</p> <p>§2. Mais, si un seul des parents est catholique, l'enfant est inscrit dans l'Église dont relève ce parent catholique.</p> |
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³ Voir J. ABBASS, « Setting Limits on the Application of the Eastern Code to the Latin Church », *StC*, 51 (2017), 25-54.

⁴ La version française des canons du *CIC* dans cet article est généralement celle qui a été faite par le frère Emmanuel Vaillant, O.S.B., moine de Solesme, à partir du texte original latin diffusé par la Salle de presse du Saint-Siège (bulletin n. 0646 du jeudi 15 septembre 2016) et parue dans le journal *La Croix* du 11 mai 2017. La traduction française des canons du CCEO est celle d'Émile Eid et René Metz, *Code des canons des Églises orientales*, texte officiel et traduction française, coédition Cerf & Libreria editrice vaticana, 1997.

En ce qui concerne l'inscription des enfants à une Église en particulier, l'article 1 de *De Concordia inter Codices* a fait, en pratique, deux changements au canon latin 111. Le premier changement implique la substitution des termes « rite » et « Église rituelle », autrefois utilisés dans le canon, pour celui d'« Église *sui iuris* ». De fait, le canon 28, §1 du *CCEO* dit : « Le rite est le patrimoine liturgique, théologique, spirituel et disciplinaire qui se distingue par la culture et les circonstances historiques des peuples et qui s'exprime par la manière propre à chaque Église *sui iuris* de vivre sa foi ». Cependant, le Code latin continue de faire référence à un « rite » (voir, par exemple, les cc. 214, 383 §2, 1015 §2) alors qu'il devrait peut-être changer l'expression et faire référence au terme juridiquement reconnu et accepté d'« Église *sui iuris* ». Cette expression ne fait pas seulement référence aux Églises catholiques orientales. Selon la note explicative officielle publiée le 8 décembre 2011 par le Conseil pontifical pour les Textes législatifs, on y indiquait que l'expression « Église *sui iuris* » pouvait, par analogie, inclure aussi l'Église latine dans le contexte des relations inter-ecclésiales⁵. La note explicative, de concert avec ces changements de terminologie, a déjà permis un accroissement de l'harmonisation entre les Codes.

Lorsqu'on a comparé l'ancien canon 111 §1 du *CIC* et le canon 29 §1 du *CCEO*, ces deux canons ne semblaient pas correspondre exactement pour deux raisons. En premier lieu, il n'y avait pas de disposition dans la norme latine pour le cas où seulement l'un des parents est catholique. Pour combler cette lacune, l'article 1 §2 du *motu proprio* a ajouté un deuxième paragraphe au canon 111. Pour ce qui est du deuxième point, alors que le canon 29 §1 prévoit qu'un enfant peut être inscrit à l'Église *sui iuris* de sa mère si les deux parents sont d'accord, certains auteurs soutenaient que le canon 111 §1 du Code latin ne semblait pas permettre la même chose dans le cas de la mère catholique orientale⁶. Pendant l'*iter* (le parcours) du canon 29 §1 du

⁵ Voir *Comm*, 43 (2011), 315-316.

⁶ Voir J.P. MCINTYRE, « Rite », dans *New Commentary on the Code of Canon Law*, J.P. BEAL et al. (dir.), New York, N.Y./Mahwah, N.J., Paulist Press, 2000, 151. L'auteur y déclare : « Le premier paragraphe du canon (1110 présente une norme restrictive. Supposons que nous trouvions un père latin et une mère orientale. Si les deux parents sont d'accord, l'enfant peut-il être baptisé dans le rite oriental? Le canon ne le permet pas. Si les deux parents sont en accord, le baptême doit se faire dans l'Église latine ». Voir aussi G. NEDUNGATT, « Churches *sui iuris* and Rites », dans *A Guide to the Eastern Code: A Commentary on the Code of Canons of the Eastern Churches*, G. NEDUNGATT (dir.), Rome: Institut pontifical oriental, 2002, 119, note 43. L'auteur déclare : « Le canon 111 §1 du *CIC* qui y correspond permet aux parents qui sont d'accord de choisir l'Église latine pour leurs enfants qui sont présentés au baptême, si l'un des parents n'y appartient pas. Il peut arriver que l'Église latine soit « l'Église rituelle » (Église *sui iuris*) de la mère ou du père, mais selon la formulation

CCEO à la *Pontificia Commissio Codicis Iuris Canonici Orientalis Recognoscendo* (PCCICOR), un membre a fait la même remarque concernant la possibilité d'inscrire un enfant à l'Église de sa mère catholique orientale. Sans fournir d'explication, le *Cætus de expensione observationum* a simplement répondu que la même possibilité existait également dans le canon 111 §1 du CIC⁷. Bien que le canon 111 §1 ne soit certainement pas explicite, on pourrait suggérer que l'inscription à l'Église latine n'est qu'une option offerte aux parents et que l'inscription à l'Église orientale dont relève la mère est aussi possible, car elle n'est pas exclue⁸.

1.2 — Formalités de passage à une autre Église (CCEO c. 36; CIC c. 112 §3)

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| CCEO can. 36 – Tout passage à une autre Église <i>sui iuris</i> entre en vigueur à partir de la déclaration faite devant le Hiérarque du lieu ou le curé propre de la même Église ou un prêtre délégué par l'un ou l'autre et deux témoins, à moins que le rescrit du Siège Apostolique n'en dispose autrement. | CIC can. 112 §3 – Tout passage à une autre Église <i>sui iuris</i> entre en vigueur à partir du moment de la déclaration faite devant un Ordinaire du lieu de la même Église ou le curé propre ou un prêtre délégué par l'un ou l'autre et deux témoins, à moins que le rescrit du Siège Apostolique n'en dispose autrement; il sera inscrit au registre des baptisés. |
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Jusqu'à la promulgation de *De Concordia inter Codices*, il n'y avait aucune procédure canonique prescrite dans le Code latin pour l'entrée en vigueur du passage à une autre Église *sui iuris*. Le législateur avait exposé une telle procédure au canon 36 du CCEO pour les Églises catholiques orientales. Toute-

du canon, ils ne peuvent, d'un commun accord, choisir l'Église orientale *sui iuris* de la mère, mais seulement celle du père ».

⁷ La remarque, ainsi que la réponse du groupe d'étude d'experts, déclarait : « si on compare le canon avec le canon 111 du CIC, nous notons que le CIC ne donne pas la possibilité d'un transfert à un rite oriental, alors que le Schéma oriental permet la possibilité d'un transfert au rite latin, si, par exemple, la mère est de ce rite. De fait, dans le cas d'une différence rituelle entre les deux parents, l'enfant pourra toujours être baptisé dans un rite oriental étant donné qu'un des deux parents lui appartient. Réponse : au canon 111 du CIC, la même possibilité existe ». Voir *Nuntia*, 28 (1989), 20 (c. 28 §1)

⁸ Voir aussi D. SALACHAS, « L'appartenanza giuridica dei fedeli a una Chiesa orientale sui iuris o alla Chiesa latina », *Periodica de re canonica*, 83 (1994), 27. L'auteur déclare : « Le *Cætus de expensione observationum* a répondu qu'« il y a la même possibilité dans le CIC », ce qui est vrai, car le c. 111 §1 ne semble pas exclure le fait que les parents appartenant à des rites différents (latin et oriental) puissent, d'un commun accord, choisir que leurs enfants soient baptisés dans l'Église orientale à laquelle appartient l'un des deux conjoints.

fois, le canon 36 du *CCEO* ne vise pas directement l'Église latine ou ne l'oblige pas même si, en accord avec la note explicative de 2011, l'Église latine est implicitement incluse parmi les Églises *sui iuris* à laquelle les fidèles catholiques orientaux peuvent choisir de passer. Mais, en l'absence de cette procédure dans les cas individuels et en vertu du canon 19 du *CIC*, les Ordinaires latins auraient tout de même pu avoir comblé ce vide législatif en suivant le canon 36 du *CCEO*. En vertu de l'article 2 du *motu proprio*, le législateur a maintenant ajouté un troisième paragraphe au canon 112 du *CIC*, dans la même veine que ce que l'on retrouve au canon 36 du *CCEO*. De fait, la formulation est presque identique, excepté lorsqu'il est fait référence à l'« Ordinaire du lieu » plutôt qu'à l'« Hiérarque du lieu ». De plus, la nouvelle norme latine exige que le passage soit inscrit dans le registre des baptêmes⁹.

Donc, en ce qui concerne les passages à une autre Église *sui iuris*, le canon 112 §3 du *CIC*, tout comme le canon 36 du *CCEO*, prescrit les formalités requises pour que ces passages entrent en vigueur. Les passages comprennent ceux qui sont effectués conformément au canon 112 §1 du *CIC*, soit avec le consentement du Saint-Siège ou celui des évêques concernés (1^o)¹⁰, soit, dans le cas d'un conjoint ou d'une conjointe qui, au moment du mariage ou pendant la durée du mariage, a déclaré qu'il ou elle passait à l'Église *sui iuris* à laquelle appartenait l'autre conjoint ou conjointe (2^o). Conséquemment, à moins que le rescrit du Saint-Siège n'en dispose autrement, ceux ou celles qui passent à une autre Église *sui iuris* (Église catholique orientale) sont tenus, dans ces cas, de faire une déclaration au moins orale devant l'Ordinaire du lieu, le curé propre ou un autre prêtre délégué par l'un ou l'autre, et en présence de deux témoins. De même, un(e) conjoint(e) de rite latin qui passe à l'Église catholique orientale *sui iuris* à laquelle appartient l'autre conjoint(e) est obligé(e) de respecter les mêmes formalités pour que le passage entre en vigueur. Dans ces cas, chaque passage entre vigueur au moment où la déclaration est faite.

⁹ L'ajout de cette clause qui prescrit que « ce passage doit être inscrit au registre des baptêmes » n'était, à strictement parler, aucunement nécessaire, puisque cette règle obligeant à inscrire de tels passages dans le registre baptismal était déjà contenue dans le canon 37 du *CCEO* (voir la section suivante) qui nommait et obligeait explicitement l'Église latine.

¹⁰ La Secrétairerie d'État a émis un rescrit particulier *ex audientia Sanctissimi*, en date du 26 novembre 1992. Le rescrit spécifiait que : « Conformément au canon 112 §1, 1^o du Code de droit canonique, il est interdit à quiconque, après la réception du baptême, d'être inscrit à une autre Église rituelle *sui iuris*, à moins d'avoir reçu à cette fin le consentement du Siège Apostolique. À ce sujet, le Souverain Pontife Jean-Paul II, après avoir accepté l'opinion du Conseil pontifical pour l'Interprétation des Textes législatifs, a déterminé qu'un consentement de cette sorte peut être présumé à toutes les fois qu'un fidèle chrétien de l'Église latine a fait une demande pour passer à une autre Église rituelle *sui iuris* qui possède une éparchie sur le même territoire, pourvu que les évêques diocésains des deux diocèses aient donné leur consentement par écrit ». Voir AAS, 85 (1993), 81. (La version française est du traducteur).

1.3 — Inscriptions/passages à inscrire dans le registre des baptêmes (CCEO c. 37; CIC c. 535 §2)

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| <p>CCEO can. 37 – Toute inscription à une autre Église <i>sui iuris</i> ou tout passage à une autre Église <i>sui iuris</i> sera noté dans le registre des baptêmes de la paroisse, même de l'Église latine, le cas échéant, où le baptême a été célébré; si cela n'est pas possible, l'enregistrement se fera dans un autre document, qui doit être conservé dans les archives de la paroisse du cure propre de l'Église <i>sui iuris</i> à laquelle l'inscription a été faite.</p> | <p>CIC can. 535 §2 – Dans le registre des baptisés, seront aussi notés l'inscription à une autre Église <i>sui iuris</i> ou le passage à une autre Église, la confirmation, de même que ce qui a trait au statut canonique des fidèles, à savoir le mariage, restant sauves les dispositions du can. 1133, l'adoption, la réception d'un ordre sacré et aussi la profession perpétuelle dans un institut religieux; ces mentions seront toujours reportées sur le certificat de baptême.</p> |
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Le canon 37 du CCEO exige que l'adhésion à une Église *sui iuris* et le passage à une autre Église soient inscrits dans le registre paroissial des baptêmes, même si la paroisse appartient à l'Église latine. L'ancien canon 535 §2 du CIC ne faisait aucune mention de l'inscription à une Église rituelle *sui iuris* ou du passage à une autre Église parmi les choses qui devaient être notées au registre des baptêmes. En procédant à la concordance entre les Codes à ce sujet, l'article 3 du *motu proprio* a formulé un nouveau canon 535, §2 qui requiert que les inscriptions et les passages soient tous deux inscrits dans le registre des baptêmes et toujours notés sur les certificats de baptême. Comme le changement effectué au canon 111 du CIC par l'article 1 du *motu proprio*, la mention antérieure du « changement de rite » a été remplacée par l'inscription (adhésion) ou le passage à une Église *sui iuris*.

1.4 — Le baptême des enfants orthodoxes (CCEO c. 681 §5; CIC c. 868 §3)

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| <p>CCEO can. 681 §5 – L'enfant de chrétiens non catholiques est baptisé licitement, si les parents ou au moins l'un d'eux, ou celui qui tient légitimement leur place, le demandent et s'il leur est physiquement ou moralement impossible d'avoir accès au ministre qui leur est propre.</p> | <p>CIC can. 868 §3 – L'enfant de chrétiens non catholiques est baptisé licitement si les parents, ou au moins l'un d'eux, ou la personne qui tient légitimement leur place, le demandent et s'il leur est physiquement ou moralement impossible d'avoir accès au ministre qui leur est propre.</p> |
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L'article 5 du *De Concordia inter Codices* a ajouté un nouveau §3 au canon 868 du CIC, lequel correspond au §5 du canon 681 du CCEO.

Comme les deux Codes de l'Église universelle ne concernent que les fidèles catholiques, les normes n'obligent pas les fidèles des Églises orthodoxes sœurs. Toutefois, même si les fidèles orthodoxes ne sont pas tenus par ces normes parallèles, ces dernières permettent aux ministres compétents de baptiser les enfants de parents orthodoxes si tous deux, ou au moins l'un des deux, ou la personne qui tient légitimement leur place, le demandent et qu'il leur est physiquement ou moralement impossible d'approcher leur propre ministre.

À la *PCCICOR*, cette norme avait déjà été ajoutée pendant la *denua recognitio* du *Schema de Culto divino et praesertim de Sacramentis* de 1980 (Schéma de 1980). Quant à l'élaboration de l'ébauche du canon 681 du *CCEO*, le groupe d'étude d'experts déclarait : « La proposition (faite par deux organismes consultatifs) d'ajouter un §5 au canon dans lequel il est dit qu'il est licite (l'un d'entre eux préfère dire «il est approprié»), dans des situations particulières, de baptiser les enfants de fidèles orthodoxes a été acceptée favorablement...¹¹ En fait, sauf pour des changements mineurs de rédaction, aucune remarque subséquente ou quelconque opposition ne furent rapportées à la *PCCICOR* pendant l'*iter* (parcours) de cette norme. Or, si cette règle a paru appropriée dans les régions orientales, le législateur l'a trouvée encore plus pertinente pastoralement dans la société actuelle, excessivement mobile, et où les catholiques orientaux, pour plusieurs raisons, se retrouvent souvent dans des territoires majoritairement latins et se voient dans l'impossibilité d'avoir accès à leur propre ministre. Par conséquent, le canon 868 §3 du *CIC* est pratiquement identique au canon 681 §5 du *CCEO*. La norme latine ne change que le terme « *physice* » pour celui de « *corporaliter* », utilise le subjonctif *sit* au lieu de l'indicatif *est* et opte pour le terme « *non catholicorum* » au lieu de « *acatholicorum* ». Le choix du terme « non catholiques » ne devrait toutefois pas être interprété comme incluant les protestants, car, dans le Préambule du *motu proprio*, le pape François dit clairement : « Il existe aussi une autre raison pour que les normes du *CIC* soient intégrées et contiennent certaines dispositions expresses, parallèles à celles que renferme le *CCEO* et c'est l'exigence de définir avec plus d'exactitude les relations avec les fidèles qui relèvent d'Églises orientales non catholiques, lesquels sont présents en nombre croissant dans les territoires latins » (*version française du traducteur*).

En raison de l'ajout de cette norme aux deux Codes (*CCEO* c. 681 §5; *CIC* c. 868 §3), le principe voulant qu'il doive y avoir un espoir fondé que l'enfant présenté au baptême sera élevé dans la religion catholique devait être

¹¹ *Nuntia*, 15 (1982), 16 (c. 16 §5).

nuancé. En conséquence, comme dans le canon 681 §1, l'article 4 de *De Concordia inter Codices* a reformulé le canon 868 §1, 2° pour qu'il se lise ainsi : « qu'il y ait un espoir fondé que l'enfant sera éduqué dans la religion catholique, *restand sauf le §3* ; si cet espoir fait totalement défaut, le baptême sera différé, selon les dispositions du droit particulier, et les parents informés du motif ».

1.5 — Seul un prêtre assiste valablement aux mariages des orientaux (*CCEO* c. 828; *CIC* c. 1108 §3)

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| <p><i>CCEO</i> can. 828 §1 – Seuls sont valides les mariages qui sont célébrés dans un rite sacré devant le Hiérarque du lieu ou le curé du lieu ou devant un prêtre auquel a été conféré par l'un d'eux la faculté de bénir le mariage et devant au moins deux témoins, cependant selon les prescriptions des canons suivants et restant sauves les exceptions dont il s'agit aux can. 832 et 834 §2.</p> <p>§2 – Ce rite est considéré comme sacré par l'intervention même d'un prêtre qui assiste à ce mariage et le bénit.</p> | <p><i>CIC</i> can. 1108 §3 – Seul le prêtre assiste valablement au mariage entre parties orientales ou entre une partie latine et une partie orientale, qu'elle soit catholique ou non.</p> |
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En vertu de l'article 6 du *motu proprio*, le §3 a été ajouté au canon 1108 du *CIC* et a effectivement résolu un doute de droit qui existait depuis un certain temps. Le doute résidait dans le fait de savoir si, oui ou non, un diacre latin pouvait valablement assister à un mariage entre deux catholiques orientaux sujets d'un Ordinaire latin ou entre une partie latine et une partie orientale, qu'elle soit catholique ou non, et bénir ce mariage. La question se posait souvent dans le cas des catholiques orientaux qui, parce qu'il n'y avait pas de hiérarque de leur propre Église *sui iuris*, étaient confiés au soin d'un Évêque latin (voir *CCEO* c. 916 §5)¹². Le canon 38 du *CCEO* stipulait que : « Même s'ils sont confiés aux soins d'un Hiérarque ou d'un

¹² Le can. 916 §5 du *CCEO* dit : « Dans les lieux où n'est érigé pas même un exarchat pour les fidèles chrétiens d'une Église *sui iuris*, doit être tenu pour Hiérarque propre de ces fidèles chrétiens le Hiérarque du lieu d'un autre Église *sui iuris*, même de l'Église latine, restant sauf le canon 101; s'il y en a plusieurs, dit être tenu pour Hiérarque propre celui qu'a désigné le Siège Apostolique ou, s'il s'agit des fidèles chrétiens d'une Église patriarcale, le Patriarche avec l'assentiment du Siège Apostolique ».

curé d'une autre Église *sui iuris*, les fidèles chrétiens des Églises orientales restent cependant inscrits à leur Église *sui iuris* »¹³. En même temps, le canon 828 §1 exige pour la validité que les mariages soient célébrés par un rite sacré. Le §2 du même canon établit que : « Ce rite est considéré sacré par l'intervention même d'un prêtre qui y assiste et le bénit ». Cependant, d'un point de vue principalement latin et au vu du canon 1108 §1 qui permet aux diacres d'assister aux mariages, certains canonistes avançaient que le diacre latin était aussi « ontologiquement et légalement acceptable pour bénir les mariages » qui impliquaient des orientaux¹⁴. Victor Pospishil alléguait bizarrement qu'un évêque latin pouvait valablement déléguer un diacre latin pour bénir le mariage d'orientaux qui lui étaient assujettis sur la base du principe « *locus regit actum* » (le lieu gouverne l'action)¹⁵. Cependant, les commentateurs autres que Pospishil s'appuyaient fortement sur la déclaration conciliaire de *Lumen Gentium* 29, qui prévoit : « Il appartient au diacre, selon ce que l'autorité compétente lui aura assigné, ... d'assister au mariage au nom de l'Église et de le bénir »¹⁶. Toutefois, après Vatican II, la Commission pontificale pour l'Interprétation des Décrets du Concile Vatican II a répondu à un *dubium* qui portait sur les

¹³ La première mention d'« Église *sui iuris* » inclut implicitement par analogie l'Église latine. Voir Conseil pontifical pour les Textes législatifs, « Note explicative concernant le canon 1 du CCEO », *Comm*, 43 (2011), 315-316.

¹⁴ La citation est de U. NAVARRETE, « Questioni sulla forma canonica ordinaria nei Codici latino e orientale », *Periodica de re canonico*, 85 (1996), 506. Voir aussi J. PRADER, *La legislazione matrimoniale latina e orientale: Problemi interecclesiali, interconfessionali e interreligiosi*, Rome, Edizioni Dehoniane, 1993, 39; Prader changea plus tard d'opinion dans *A Guide to the Eastern Code (A Commentary on the Code of Canons of the Eastern Churches)*, Rome, Institut pontifical oriental, 2002, 569-570, G. NEDUNGATT (dir.), et dans la deuxième édition de son *Il matrimonio in Oriente e in Occidente*, Rome, Institut pontifical oriental, 2003, 249; G. GALLARO, "Canon 1108 – Latin deacon assisting at marriage of two Eastern Catholics" (canon 1108 – diacre latin qui assiste au mariage de deux catholiques orientaux), *RR*, (1995), 91; et V. POSPISHIL, *Eastern Catholic Church Law*, 2^e édition, New York : Saint Maron publications, 1996, 574.

¹⁵ V. POSPISHIL, *Eastern Catholic Church Law*, 2^e edition, New York, Saint Maron publications, 1996. Il est clair que le principe *locus regit actum* ne s'applique pas aux cas de mariage de catholiques orientaux qui sont tenus de suivre les normes matrimoniales qui leur sont propres, quel que soit l'endroit où ils se trouvent dans le monde. Le commentaire Cicognani-Staffa du Code latin de 1917 faisait explicitement référence à cette exception. Il déclarait : « Toutefois, dans ce cas (concernant le principe *locus regit actum*), il y a des exceptions : par exemple, quel que soit l'endroit où vont les orientaux, ils suivent les normes qui leur sont propres lorsqu'ils célèbrent leurs fiançailles et contractent mariage ». Voir H.J. CICOGNANI et D. STAFFA, *Commentarium ad Librum Primum Codicis Iuris Canonici*, 2 vols., Rome, Pontificum Institutum Utriusque Iure, 1939, 1:32.

¹⁶ Voir Constitution dogmatique *Lumen Gentium*, n. 29, dans *Les Actes du Concile Vatican II*, 2^e édition revue, corrigée et augmentée, Les Éditions du Cerf, Paris, 1966, p. 57.

facultés d'un diacre l'autorisant à bénir. La Commission avait déclaré : « Le diacre ne peut conférer que les bénédictions ... qui lui ont été expressément permises par le droit »¹⁷. C'est précisément le canon oriental 828 §2 qui exclut le diacre en déclarant explicitement que le rite est sacré « par l'intervention même d'un prêtre qui y assiste (au mariage) et le bénit ». Par conséquent, d'autres canonistes insistaient que, dans le contexte de la collaboration et des relations interecclésiales actuelles, on ne pouvait ignorer le canon 828 §2 dans le cas des mariages d'orientaux confiés aux soins d'un évêque latin¹⁸. De fait, autant le canon 828 §2 du *CCEO* que le canon 1108 §1 du *CIC* constituent des parties intégrales d'un seul *corpus* de droit canonique dans l'Église catholique. Qui plus est, à la *PCCICOR*, le rite sacré, en tant qu'un élément essentiel de la forme canonique, a été continuellement mis en lumière et sauvegardé comme une institution caractéristique de l'institution orientale¹⁹. Dans un *motu proprio* qui cherche à harmoniser de plusieurs façons les deux Codes de l'Église catholique, le pape François reconnaît néanmoins la particularité du rite sacré qui a traditionnellement distingué la célébration des mariages orientaux et veut le préserver. Par conséquent, conformément au canon 1108 §3 du *CIC*, un diacre latin ne peut valablement assister au mariage des orientaux puisque l'intervention d'un *sacerdos* (prêtre ou évêque) qui assiste à ces mariage et les bénit par un rite sacré est requis pour la validité (voir aussi *CCEO* c. 828).

¹⁷ AAS, 66 (1974), 667.

¹⁸ Voir, par exemple, D. SALACHAS, *Il sacramento del matrimonio nel nuovo diritto canonico delle Chiese orientali*, Rome/Bologne: Edizioni Dehoniane, 1994, 200-201, note de bas de page 43; C.G. FÜRST, « Probleme der Form der Eheschließung von Orientalen oder mit Orientalen », *De processibus matrimonialibus*, 2 (1995), 36-37 et J. ABBASS, *Two Codes in Comparison*, Rome, Institut pontifical oriental, 2007, 100-103.

¹⁹ Par exemple, lorsque six organismes consultatifs proposèrent que les Hiérarques du lieu orientaux aient les mêmes facultés que les Ordinaires du lieu latins en ce qui avait trait à la dispense de la forme canonique, le groupe d'étude d'experts a répondu : « on ne peut accepter cette proposition, car elle est contraire à la conception orientale du *ritus sacer* dans la célébration du mariage, lequel est également si bénéfique dans le monde moderne où il est nécessaire de mettre en lumière le caractère sacré du consentement matrimonial, alors que dans certains cas particuliers, il est possible de faire le nécessaire au moyen de facultés spéciales concédées aux évêques ». Voir *Nuntia*, 15 (1982), 85-86. Encore une fois, trois membres de la *PCCICOR* proposèrent plus tard que la faculté de dispenser de la forme canonique dans les cas de mariages mixtes soit concédée aux Évêques orientaux à l'instar des Évêques latins. Le groupe spécial d'étude répondit : « La faculté de dispenser du *riter sacer* doit demeurer réservée au Saint-Siège dans le Code commun, afin de sauvegarder cette institution si caractéristique de l'Orient ». Voir *Nuntia*, 28 (1989), 116-117 (c. 829).

Suite au nouveau canon 1108 §3 et pour y être conforme, le législateur a apporté une nuance au canon *CIC* 1111 §1 en ce qui concerne plus précisément la possibilité de déléguer un diacre pour assister aux mariages dans l'Église latine. Conformément à l'article 8 du *De Concordia inter Codices*, le canon *CIC* 1111 §1 se lit maintenant comme suit : « L'Ordinaire du lieu et le curé, aussi longtemps qu'ils remplissent valablement leur office, peuvent déléguer aux prêtres et aux diacres la faculté d'assister aux mariages dans les limites de leur territoire, *restant sauves les dispositions du canon 1108 §3* ». Puisque seul un *sacerdos* (évêque ou prêtre) célèbre valablement les mariages impliquant des orientaux, qu'ils soient catholiques ou non, un diacre ne peut être délégué pour assister à ces mariages.

Comme c'était le cas pour le canon 1111 §1 du *CIC*, le canon 1112 §1 du *CIC* devait aussi subir des modifications, suite à l'ajout par le législateur du canon 1108 §3 au Code latin. En raison de l'article 9 du *motu proprio*, le canon 1112 §1 du *CIC* se lit maintenant comme suit : « Là où il n'y a ni prêtre ni diacre, l'Évêque diocésain, sur avis favorable de la conférence des Évêques et avec l'autorisation du Saint-Siège, peut déléguer des laïcs pour assister aux mariages, *restant sauves les dispositions du canon 1108 §3* ». La possibilité de déléguer une personne laïque pour assister à ces mariages est donc exclue, parce que seuls un évêque et un prêtre (*sacerdos*) peuvent valablement assister à un mariage entre orientaux, ou entre une partie latine et une partie orientale, qu'elle soit catholique ou non, et bénir ce mariage.

En faisant référence à un mariage mixte où la partie non-catholique appartenait à un rite oriental, l'ancien canon 1127 §1 du *CIC* exigeait, pour la validité, la présence d'un ministre sacré. En accord avec le nouveau canon 1108 §3 du *CIC* et la règle voulant que seul un prêtre assiste valablement à un mariage qui unit des orientaux, l'article 11 du *De Concordia inter Codices* a révisé le canon 1127 §1 pour exiger la présence d'un prêtre. La norme latine stipule maintenant : « En ce qui concerne la forme à observer dans le mariage mixte, les dispositions du canon 1108 seront suivies; cependant, si la partie catholique contracte mariage avec une partie non catholique de rite oriental, la forme canonique de la célébration doit être observée pour la licéité seulement ; mais pour la validité est requise la présence d'un *prêtre*, en observant les autres règles du droit ». Lorsqu'il parle de « présence », le *motu proprio* entend par là l'intervention d'un prêtre qui assiste au mariage et le bénit (voir cc. 1108 §3 et 1116 §3 du *CIC*). Comme dans les formulations révisées des canons 111-112 et 535 §2 du *CIC*, la référence au « rite » dans le canon latin 1127 §1 peut avoir

cédé au terme « Église », car il s'agit des Églises sœurs orthodoxes qui sont envisagées ici.

1.6 — La faculté de bénir les mariages des sujets et des non-sujets (CCEO c. 829 §1; CIC c. 1109)

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| <p>CCEO can. 829 §1 – Le Hiérarque du lieu et le curé du lieu qui ont pris possession de leur office et tant qu'ils remplissent légitimement cet office bénissent valablement le mariage partout dans les limites de leur territoire, que les époux soient leurs sujets ou qu'ils ne soient pas leurs sujets, pourvu que l'une des parties au moins soit inscrite à leur Église <i>sui iuris</i>.</p> | <p>CIC can. 1109 – L'Ordinaire du lieu et le curé, à moins qu'ils n'aient été, par sentence ou par décret, excommuniés ou interdits, ou suspens de leur office ou déclarés tels, assistant valablement en vertu de leur office, dans les limites de leur territoire, aux mariages non seulement de leurs sujets, mais aussi, pourvu que l'une des parties au moins soit inscrite à l'Église latine, de ceux qui ne le sont pas.</p> |
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L'ancien canon 1109 disait : « L'Ordinaire du lieu et le curé, à moins qu'ils n'aient été, par sentence ou par décret, excommuniés ou interdits, ou suspens de leur office ou déclarés tels, assistent valablement, en vertu de leur office, dans les limites de leur territoire, aux mariages non seulement de leurs sujets, mais aussi de ceux qui ne le sont pas, pourvu que l'un ou l'autre soit de rite latin »²⁰. Parce que la clause qui spécifiait « *pourvu que l'un ou l'autre soit de rite latin* » venait à la fin du canon, certains auteurs interprétaient la norme pour signifier qu'un Ordinaire du lieu latin ou un curé latin ne pouvaient assister au mariage des orientaux, même de ceux qui étaient confiés à leur soin, puisqu'ils n'appartenaient pas au rite latin. Pour surmonter cette difficulté d'interprétation, le législateur, par l'article 7 du *motu proprio*, a simplement adopté une formulation qui suit plus étroitement le canon 829 §1, parallèle au canon 1109. Tant la norme latine que la norme orientale s'accordent à présent en ce que la clause conditionnelle « pourvu que l'une des parties au moins soit inscrite à l'Église latine » est placée en référence plus immédiate aux non-sujets.

²⁰ Le texte latin du canon 1109 du CIC se lisait comme suit : « *Loci Ordinarius et parochus, nisi per sententiam vel per decretum fuerint excommunicati vel interdicti vel suspensi ab officio aut tales declarati, vi officii, intra fines sui territorii, valide matrimonii assistunt non tantum subditorum, sed etiam non subditorum, dummodo eorum alteruter sit ritus latini* ».

1.7 — La bénédiction des mariages de fidèles orthodoxes (*CCEO* c. 833 §§1-2; *CIC* c. 1116 §3).

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| <p><i>CCEO</i> can. 833 §1 – Le Hiérarque du lieu peut conférer à tout prêtre catholique la faculté de bénir le mariage des fidèles chrétiens d'une Église orientale non catholique qui ne peuvent aller trouver sans grave inconvénient un prêtre de leur propre Église, s'ils le demandent spontanément et pourvu que rien ne s'oppose à la célébration valide ou licite du mariage.</p> <p>§2 – Le prêtre catholique, avant de bénir le mariage, informera de cela, si c'est possible, l'autorité compétente de ces fidèles chrétiens.</p> | <p><i>CIC</i> can. 1116 §3 – Dans les mêmes circonstances qu'aux nn. 1^o et 2^o, l'Ordinaire du lieu peut conférer à tout prêtre catholique la faculté de bénir le mariage des fidèles des Églises orientales qui ne sont pas en pleine communion avec l'Église catholique, s'ils le demandent spontanément et pourvu que rien ne s'oppose à la célébration valide et licite du mariage. Néanmoins, le prêtre en informera, toujours avec la prudence nécessaire, l'autorité compétente de l'Église non catholique concernée.</p> |
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Par rapport à la faculté qui peut être conférée à tout prêtre catholique de bénir le mariage de fidèles appartenant à une Église orientale non catholique (orthodoxe), le Code oriental contenait déjà une disposition unique au canon 833 du *CCEO*. À la *PCCICOR*, ce canon fut ajouté à l'ébauche du Code oriental seulement après que le *Schema Codicis Iuris Canonici Orientalis* (*SCICO*) eut été envoyé aux membres pour qu'ils fassent leurs remarques. Le *Cætus de expensione observationum*, à qui on avait confié la tâche de réviser ces remarques, notait qu'une proposition avait été faite pour insérer ce canon afin de répondre à des exigences pastorales. Les experts acceptèrent la proposition et la formulation exacte qu'ils avaient faite du canon fut promulguée subséquemment²¹.

Alors que le Code latin de 1983 n'avait pas contenu ce canon, le besoin pastoral pour qu'il soit ajouté devint graduellement évident, de la même manière qu'on avait vu la nécessité d'une norme portant sur le baptême des enfants de chrétiens non catholiques (voir paragraphe 1.4 ci-dessus concernant le nouveau canon 863 §3 du *CIC*). Étant donné la grande mobilité de la société d'aujourd'hui, Les fidèles chrétiens appartenant à une Église orientale non catholique peuvent tout aussi souvent se retrouver dans des territoires majoritairement latins, avec la conséquence qu'il peut leur être impossible d'avoir accès à un prêtre de leur propre Église pour bénir leur

²¹ Voir *Nuntia*, 28 (1989), 115 (c. 827 bis).

mariage. L'article 10 du *De Concordia inter Codices* résout cette lacune pastorale en ajoutant un §3 au canon 1116 du *CIC*. Un Ordinaire du lieu peut conférer à n'importe lequel prêtre catholique la faculté de bénir le mariage des orientaux non catholiques, s'ils le demandent spontanément et à condition que rien n'empêche la célébration valide et licite du mariage. Cependant, contrairement au canon 833 du *CCEO*, l'application du canon 1116 §3 est soumise à deux circonstances restrictives qui sont mentionnées dans son §1 : 1°, le danger de mort ou 2°, pourvu qu'avec prudence, il soit prévu qu'un prêtre compétent selon le droit ne puisse être présent ou être rejoint sans graves inconvénients et que cette situation durera un mois. De plus, contrairement au canon 833 §2, la nouvelle norme latine n'exige pas du prêtre qu'il informe, si cela est possible, l'autorité compétente de ces fidèles chrétiens avant de bénir le mariage. Cependant, s'il informait auparavant l'autorité compétente, ce que n'exclut pas le canon 1116 §3, il pourrait arriver que cette autorité puisse suppléer rapidement à l'absence d'un ministre propre ou, au moins, en dedans d'un mois. De ce fait, même si le canon 1116 §3 du *CIC* parvient à une certaine harmonie avec le canon 833 du *CCEO*, il ne semble pas être le même à tous les points de vue.

2 — Il demeure un certain manque d'harmonie entre les Codes

Comme il en a été question dans la première partie, le *motu proprio De Concordia inter Codices* du pape François a réalisé une certaine harmonie entre les deux Codes de l'Église catholique en incorporant au Code latin un nombre limité de normes auparavant uniques au Code orientale. Néanmoins, plusieurs autres normes orientales demeurent distinctes ou diffèrent des normes latines parallèles examinées sous certains aspects par le *motu proprio*. Dans cette partie, nous regarderons trois groupes de canons parallèles afin de montrer que le travail d'harmonisation et de clarification a peut-être besoin de se poursuivre.

2.1 — Le devoir d'un évêque de s'occuper des autres fidèles (*CCEO* c. 193 §1; *CIC* c. 383 §§1-2)

Au début du Préambule du *De Concordia inter Codices*, le pape François indique que, même si le Code latin et le Code oriental ont des normes parallèles ou communes, ils peuvent aussi avoir leurs différences et, pour éviter des effets négatifs sur la pratique pastorale, il explique qu'il doit y avoir un

degré d'harmonie approprié, mais pas nécessairement exact, entre ces normes. Le Saint-Père déclare :

Les deux codes renferment, en effet, des normes communes, et d'autre part, des parties spéciales et propres qui les rendent indépendants l'un de l'autre. Il est pourtant nécessaire que, même dans les normes spéciales, il y ait un certain degré d'harmonie. C'est que ces divergences, dans la mesure où elles sont présentes, génèrent des inconvénients dans la pratique pastorale, surtout quand doivent être réglées les relations entre des membres appartenant à l'Église latine d'une part, et à une Église orientale d'autre part.

Immédiatement après, le Pape François aborde la question de la relation entre le c. 193 §1 du *CCEO* et le c. 383 §§1-2 du *CIC* qui parlent du devoir d'un évêque envers les fidèles appartenant à une autre Église *sui iuris* et qui sont confiés à ses soins. Le législateur fait la distinction entre ces normes parallèles et semble limiter aux évêques orientaux l'application du c. 193 §1 du *CCEO* tandis qu'il définit le degré de l'obligation de sollicitude d'un évêque latin selon le c. 383 du *CIC*. Le fait d'avoir des normes parallèles régissant des sujets parallèles ne garantit pas toujours l'application de règles en parfait accord dans l'Église latine et dans les Églises orientales catholiques.

Quant au devoir de sollicitude d'un évêque latin envers les catholiques orientaux qui lui sont confiés, le c. 383 §1 déclare : « Que dans l'exercice de sa charge pastorale, l'Évêque diocésain montre sa sollicitude à l'égard de tous les fidèles confiés à ses soins, quels que soient leur âge, leur condition ou leur nationalité, qu'ils habitent sur son territoire ou qu'ils s'y trouvent pour un temps ... » Pour déterminer comment cette sollicitude doit se manifester concrètement, le c. 383 §2 du *CIC* dit : « S'il a dans son diocèse des fidèles de rite différent, il pourvoira à leurs besoins spirituels par des prêtres ou des paroisses de ce rite, ou bien par un vicaire épiscopal ». Toutefois, le canon 193 §1 du *CCEO* qui lui est parallèle, et qui n'a aucune contrepartie identique dans le Code latin, établit un critère de sollicitude plus élevé pour les évêques orientaux auxquels ont été confiés les fidèles d'une autre Église *sui iuris*, y compris l'Église latine. Ce canon déclare :

L'Évêque éparchial, aux soins duquel sont confiés les fidèles chrétiens d'une autre Église *sui iuris*, est tenu par la grave obligation de veiller en tout (*gravi obligatione tenetur omnia providendi*) à ce que ces fidèles chrétiens conservent le rite de leur propre Église, le pratiquent et l'observent autant qu'ils le peuvent et qu'ils favorisent les relations avec l'autorité supérieure de cette Église.

Les canonistes ont débattu pendant plusieurs années après la promulgation du Code oriental à savoir si un évêque latin était, oui ou non, tenu par la

même obligation envers les orientaux qu'un évêque oriental l'était envers d'autres orientaux et même des catholiques latins confiés à ses soins. De fait, le Conseil pontifical pour l'Interprétation des Textes législatifs, comme il était alors appelé, reconnaissait en 1999 qu'une question lui avait été soumise pour étude concernant « certaines remarques sur la relation entre le canon oriental 193 §1 et le canon latin 383 §2 »²². Certains auteurs avaient avancé que, même si les deux Codes sont les parties intégrales de l'unique *Corpus Iuris Canonici* de l'Église universelle, ils sont toujours séparés et distincts. De ce fait, on ne peut simplement pas établir un lien entre eux de façon à imposer l'obligation plus grave du canon oriental 193 §1 aux évêques latins qui sont déjà gouvernés par le canon latin 383 §§1-2 à propos de la sollicitude qu'ils doivent manifester envers les fidèles d'une autre Église²³. D'un autre côté, d'autres canonistes avaient maintenu que, malgré l'absence d'une mention expresse des évêques latins dans la norme orientale, l'obligation plus grave dans le canon 193 §1 du *CCEO* s'appliquait aussi implicitement aux évêques latins en raison de la nature des choses (*ex natura rei*) et/ou de la *ratio* même qui inspirait cette norme orientale. Le législateur n'avait pas besoin de mentionner explicitement les évêques latins puisque tous les évêques, qu'ils soient orientaux ou latins, avaient la sérieuse obligation de fournir tout ce qui était nécessaire aux fidèles pour qu'ils conservent et pratiquent leur propre rite, étant donné qu'il s'agissait là d'un droit fondamental de la personne²⁴. Cette position a recueilli des appuis à partir de l'argumentation avancée au fil des ans par le père Ivan Žužek, s.j., Secrétaire de la *PCCICOR* et rapporteur du *Cætus de S. Hierarchia* qui a rédigé l'ébauche

²² *Comm.*, 31 (1999), 50.

²³ Voir C.G. FÜRST, « Zur Interdependenz von lateinischem und orientalischem Kirchenrecht: Einige Anmerkungen zum Kirchenrecht der katholischen Kirche », dans *Iuri Canonico Promovendo. Festschrift für Heribert Schmitz zum 65. Geburtstag*, W. AYMANS et al. (dir.), Regensburg, Pustet, 1995, 553; M. BROGI, « Il nuovo codice orientale e la Chiesa latina », *Antonianum*, 66 (1991), 60, note 96; J. ABBASS, « Le 'ultime modifiche' al Codice di diritto canonico orientale », dans K. BHARANIKULANGARA (dir.), *Il Diritto Canonico Orientale nell'ordinamento ecclesiale*, Cité du Vatican, Libreria Editrice Vaticana, 1995, 226-230; IDEM, « Canonical Dispositions for the Care of Eastern Catholics outside their Territory », *Periodica de re canonica*, 86 (1997), 330-346; IDEM, « Latin Bishops' Duty of Care towards Eastern Catholics », *StC*, 35 (2001), 7-32; et IDEM, *The Eastern Code (Canon 1) and Its Application to the Latin Church*, Bangalore, Dharmaram Publications, 2014, 28-36.

²⁴ Voir M. BROGI, « Cura pastorale di fedeli di altra Chiesa *sui iuris* », *REDC*, 53 (1996), 124; L. OKULIK, « Tutela giuridica dell'identità ecclesiale dei fedeli orientali in situazione di diaspora », dans *Nuove terre e nuove Chiese: la comunità di fedeli orientali in diaspora*, L. OKULIK (dir.), Venice, Marcianum Press, 2008, 231-232; et O. CONDORELLI, « Giuridizione universale delle Chiese *sui iuris*? Tra passato e presente », dans *Cristiani orientali e pastori latini*, O. GEFAELL (dir.), Milan, Giuffrè Editore, 2012, 104, note 133.

du canon oriental 193 §1²⁵. La pensée d' Ivan Žužek avait même trouvé écho chez le pape saint Jean-Paul II au moment de la promulgation du Code oriental. Dans la constitution apostolique *Sacri canones*, avec laquelle le pape promulguait le Code oriental, le Saint-Père disait : « En effet, ce Code protège le droit fondamental lui-même de la personne humaine, à savoir de professer la foi chacun dans son rite ordinairement puisé au sein même de la mère, ce qui est la règle de tout 'œcuménisme' »²⁶.

Dans le Préambule du *De Concordia inter Codices*, le pape François aborde en particulier la relation entre le canon 193 §1 du *CCEO* et le canon 383 §§1-2 du *CIC* et d'aucuns pourraient dire que le législateur lui-même règle effectivement la question posée au Conseil pontifical pour l'Interprétation des Textes législatifs en 1999. Concernant la question, le pape François déclare : « En particulier, on doit se rappeler que les fidèles orientaux sont tenus d'observer chacun son rite propre, où qu'ils se trouvent dans le monde et, par conséquent, qu'il appartient au plus haut degré à l'autorité ecclésiastique compétente de veiller à ce que soient mis à leur disposition les moyens appropriés (*auctoritatis ecclesiasticæ competentis est maximopere curare ut congrua media apparentur*) par lesquels ils pourront s'acquitter de cette obligation »²⁷.

²⁵ I. ŽUŽEK, « Observations à M. le Prof. Sobanski », dans *Les droits fondamentaux du chrétien dans l'Église et dans la société; Actes du IV^e Congrès de Droit Canonique*, E. CORECCO et al. (dir.), Fribourg, Freiburg im Brisgau et Milan, Éditions Universitaires, Herder et Giuffrè, 1981, 742. Žužek déclarait : « D'un côté, en fait, il s'agit en réalité d'une question qui concerne l'œcuménisme mais, de l'autre, on nie ou on questionne le droit de ces Églises à exister, un droit, pourtant, qui a priorité parmi les droits fondamentaux et qui, pour les individus qui sont unis à l'Église catholique, implique d'autres droits essentiels en faisant ressortir les droits les plus sacrés des personnes, car ils constituent le 'moi' le plus intime qui est le droit de préserver leur propre identité chrétienne dans laquelle ils ont vécu et ont grandi depuis leur plus tendre enfance, en commençant par leur première prière faite sur les genoux de leur mère ». Lors d'une conférence ultérieure (juillet 1989) donnée à des canonistes italiens en préparation à la promulgation du nouveau Code oriental, Žužek disait : « Certainement, de même que toutes les personnes appartiennent à un espace culturel précis, de même tous les baptisés, en vertu de leurs antécédents familiaux, et même encore sur les genoux de leur mère, appartiennent à un rite particulier, c'est-à-dire qu'ils sont formés à l'intérieur d'un cadre patrimonial particulier de liturgie, de théologie, de spiritualité et de discipline. Ainsi, chaque Église *sui iuris* est entièrement imprégnée de son rite, à partir de ses racines les plus anciennes jusqu'à ses institutions les plus modernes ». Voir I. ŽUŽEK, « Presentazione del *Codex Canonum Ecclesiarum Orientalium* », *ME*, 115 (1990), 121.

²⁶ AAS, 82 (1990), 1035.

²⁷ Le texte latin se lit comme suit : « Speciatim est memorandum christifideles orientales ad suum cuiusque ritum servandum teneri, ubicumque terrarum inveniantur, ac proinde auctoritatis ecclesiasticæ competentis est maximopere curare ut congrua media apparentur quibus ipsi hanc suam obligationem implere queant » Voir : http://w2.vatican.va/content/francesco/la/motu_proprio/documents/papa-francesco-motu-proprio_20160531_de-concordia-inter-codices.html/

Le Saint-Père ne dit pas que l'obligation très grave établie par le canon 193 §1 du *CCEO* s'applique implicitement aussi aux évêques latins à qui est confié le soin des fidèles orientaux. Il est vrai que le pape clarifie et précise plus loin la « sollicitude » (*CIC* c. 383 §1) que les évêques latins doivent montrer aux fidèles orientaux confiés à leurs soins, mais il n'affirme pas qu'ils sont en outre tenus *ex natura rei* par le canon 193 §1 en raison de la nature inter-ecclésiale des choses ou du droit fondamental sous-jacent des fidèles. Parmi les articles du *motu proprio* qui concernent l'Église latine, le législateur ne fait pas correspondre le canon 383 §§1-2 du *CIC* au canon 193 §1 du *CCEO* et il n'ajoute pas non plus la norme orientale unique au Code latin. Il est certain que le Préambule veut renforcer et caractériser avec plus de précision la sollicitude que les évêques latins doivent manifester envers les orientaux qui sont confiés à leurs soins, mais il ne leur impose pas l'obligation grave de faire tout en leur pouvoir pour que ces orientaux puissent observer à tous les points de vue le rite qui leur est propre. En revanche, pour ce qui est du grave devoir de vigilance imposé aux évêques orientaux auxquels sont confiés des fidèles d'une autre Église *sui iuris*, y compris l'Église latine, le canon oriental 193 §1 parallèle, mais unique, établit clairement qu'un évêque a l'obligation grave de veiller en tout (*gravi obligatione tenetur omnia providendi*) à ce que ces fidèles observent le rite qui leur est propre, et ce à tous égards. Il est clair que le *motu proprio* ne va pas aussi loin.

Mais d'un autre point de vue, on pourrait avancer que le pape François a considéré que le devoir de vigilance d'un évêque, que ce soit en vertu du canon 193 §1 du *CCEO* ou du canon 383 §§1-2 du *CIC*, était le même et qu'il était lié au droit fondamental d'un fidèle de chérir et d'observer autant que possible le rite qui lui est propre. Après tout, les canonistes ont débattu pendant des années, et avec ce qui semble quelque succès, sur le fait que le Code oriental et le Code latin étaient étroitement liés, particulièrement dans le domaine des relations inter-ecclésiales. Pourquoi l'ensemble des évêques n'auraient-ils pas la même obligation de sollicitude envers les fidèles d'une autre Église *sui iuris* qui sont confiés à leurs soins? De par la nature des choses, l'obligation d'un évêque, dont parlent les deux Codes, est certainement sérieuse. La seule différence est que le canon 193 §1 du *CCEO* exige d'un évêque qu'il veille en tout (*omnia providendi*) à ce que ces fidèles observent le rite qui leur est propre. Il se peut simplement que le législateur en soit venu à la conclusion que cette obligation était trop onéreuse et, tout en définissant plus précisément la sollicitude d'un évêque en vertu du canon 383 §§1-2, le Saint-Père a trouvé une formulation sur ce sujet que tous les évêques peuvent suivre. Dans le Préambule du *De Concordia inter Codices*, le pape François peut très bien avoir eu l'intention d'adoucir l'obligation d'un évêque selon le canon 193 §1 du *CCEO* afin de la faire

correspondre à un objectif plus réalisable, de façon à ce que les fidèles appartenant à une autre Église soient pourvus des moyens appropriés (*ut congrua media apparentur*) pour conserver et chérir le rite qui leur est propre, où qu'ils soient dans le monde. C'est ici l'épreuve permettant au législateur de mesurer le devoir de sollicitude d'un évêque et le *motu proprio* constitue la dernière législation pour les deux Codes. Cependant, le pape n'abroge expressément d'aucune façon les normes précédentes ou y déroge, et il ne fait référence à aucune interprétation authentique ou à une réponse du Conseil pontifical pour l'Interprétation des Textes législatifs à la question qui a été posée en 1999. Cependant, étant donné les arguments opposés et les doutes qui demeurent, il semblerait qu'une réponse définitive à la question de 1999 contribuerait sans aucun doute à démontrer le souci constant du législateur de réaliser une plus grande harmonisation du Code oriental et du Code latin.

2.2 — Le mariage devant les seuls témoins (CCEO c. 832 §1; CIC c. 1116 §1)

Dans le *motu proprio De concordia inter Codices*, le législateur réalise une uniformité des Codes au nouveau canon 1108 §3 du CIC en établissant, en effet, qu'un diacre latin ne peut valablement assister au mariage entre des parties orientales, ou entre une partie latine et une partie orientale, qu'elle soit catholique ou non. Toutefois, à la lumière de cette nouvelle norme et compte tenu des anciennes traditions orientales, le canon 832 du CCEO parallèle au canon 1116 du CIC et qui permettent tous deux la célébration valide d'un mariage devant les seuls témoins, créent un certain manque d'harmonie.

Il est vrai qu'en ajoutant un §3 au canon 1108 du CIC, l'article 6 du *De concordia inter Codices* a résolu le doute de droit qui existait depuis un certain temps, à savoir si, oui ou non, un diacre latin pouvait assister valablement à un mariage entre orientaux catholiques, ou entre une partie latine et une partie orientale, et bénir ce mariage. Le canon 1108 §3 du CIC déclare : « Seul le prêtre assiste valablement au mariage entre parties orientales ou entre une partie latine et une partie orientale, qu'elle soit catholique ou non ». Cet ajout est en harmonie avec le canon 828 §1 qui exige, pour la validité, que les mariages soient célébrés par un rite sacré, et le canon 828 §2 du CCEO qui dit expressément : « L'intervention même d'un prêtre qui assiste à ce mariage et le bénit est considéré comme un rite sacré ». En affirmant qu'un diacre ne peut assister valablement au mariage d'orientaux, le pape François a effectivement reconnu et mis en lumière la particularité du rite sacré qui a traditionnellement distingué la célébration des mariages

orientaux. Cependant, comme le Saint-Père le dit dans le Préambule au *motu proprio*, ces particularités vont parfois rendre les Codes mutuellement indépendants. Ceci est encore clairement indiqué au canon 835 du *CCEO* concernant la dispense de la forme canonique. Contrairement au canon parallèle 1127 §2 du *CIC* qui permet à un Ordinaire du lieu latin de dispenser de la forme canonique dans des cas individuels si de sérieuses difficultés empêchent qu'elle soit observée, le canon 835 du *CCEO* stipule : « La dispense de la forme de la célébration du mariage prescrite par le droit est réservée au Siège Apostolique ou au Patriarche, qui ne la concédera que pour un motif très grave ». Si le rite sacré est si essentiel à la forme canonique des mariages orientaux et que le Code latin été modifié pour être en harmonie avec cela, on peut se demander pourquoi les canons parallèles des deux Codes concernant le mariage devant les seuls témoins s'accordent encore sur ce point.

Par rapport à la forme extraordinaire du mariage, le canon 832 §1 du *CCEO*, comme le canon 1116 §1 du *CIC*, établit :

S'il n'est pas possible d'avoir ou d'aller trouver sans grave inconvénient un prêtre compétent selon le droit, les personnes qui veulent célébrer un vrai mariage peuvent le célébrer valablement et licitement devant les seuls témoins : 1° en danger de mort; 2° en dehors du danger de mort, pourvu que l'on prévoie prudemment que cette situation durera un mois.

Au cours de l'élaboration, à la *PCCICOR*, du canon oriental 832 §1, quatre organismes consultatifs proposèrent de reformuler la norme pour exiger la présence d'un prêtre pour assister au mariage et le bénir en un rite sacré. Le groupe d'étude des experts répondit : « La proposition, bien qu'elle soit compréhensible jusqu'à un certain point dans le cadre de la pensée orientale sur la célébration d'un mariage, n'est pas — ni ne peut être — acceptée par ce groupe d'étude, car le canon se base sur le *ius naturale*... »²⁸. Mis à part ce droit basé sur la loi naturelle, la loi positive de l'Église a toujours cherché à préserver les traditions orientales et, plus spécialement, à sauvegarder le rite sacré des mariages orientaux. Le nouveau canon 1108 §3 du *CIC* constitue encore une autre mesure prise pour protéger le rite sacré en ne permettant pas un diacre latin à assister aux mariages impliquant des orientaux. L'importance de sauvegarder le rite sacré a été soulignée à maintes reprises par les groupes d'étude d'experts au *PCCICOR* de même que par les membres de la *PCCICOR*, y compris les chefs des Églises catholiques orientales. Une revue de l'histoire législative du canon 835 du *CCEO* illustre bien ce point.

²⁸ *Nuntia*, 15 (1982), 84 (c. 168 §1).

À la *PCCICOR*, le *Cætus de matrimonio* proposait une première formulation du canon oriental 835²⁹. Il est ensuite apparu en tant que canon 169 §3 du Schéma de 1980³⁰. Au cours de la *denua recognitio* du Schéma de 1980, six organismes consultatifs proposèrent d'accorder aux Hiérarques du lieu orientaux les mêmes facultés que les Ordinaires du lieu latins possédaient relativement à la forme canonique. Le groupe d'étude répondit de la façon suivante à cette proposition :

Elle n'est pas acceptée, car elle est contraire à la conception orientale de *ritus sacer* dans la célébration du mariage, lequel est si bénéfique dans le monde moderne où il est nécessaire de mettre en lumière le caractère sacré du consentement matrimonial, bien que dans certains cas particuliers, il soit possible de l'accorder au moyen de facultés spéciales concédées aux évêques³¹.

Avant la publication du *SCICO* de 1986, la norme fut reformulée et la dispense de la forme, et pas seulement du *ritus sacer*, fut réservée au Saint-Siège ou au patriarche. Le canon 829 du *SCICO* déclarait : « la dispense de la forme requise par le droit est réservée au Siège Apostolique ou au Patriarche qui ne peuvent la concéder que pour une très grave raison »³². En ce qui concerne les remarques faites au *SCICO* de 1986, trois membres de la *PCCICOR* proposaient que la faculté de dispenser de la forme canonique devrait être concédée aux évêques orientaux, comme c'était le cas pour les évêques latins, dans le cas de mariages mixtes. Le groupe spécial d'études répondit : « La faculté de dispenser du *ritus sacer* doit, dans le Code commun, demeurer réservée au Saint-Siège afin de sauvegarder cette institution si caractéristique de l'Orient »³³.

Lors de la deuxième Assemblée plénière de la *PCCICOR* (3 au 14 novembre 1988), cinq membres présentèrent de nouveau une motion visant à étendre aux évêques orientaux de même qu'aux évêques latins la même faculté de dispenser de la forme. On faisait valoir que, lorsqu'on comparait le canon 1127 §2 du *CIC* au canon 829 du *SCICO*, « on ne pouvait s'empêcher de noter une certaine *deminutio capitis* des évêques orientaux vis-à-vis les évêques latins »³⁴. En même temps, une autre motion était soumise visant à modifier

²⁹ *Nuntia*, 8 (1979), 26-27 (c. 57).

³⁰ *Nuntia*, 10 (1980), 52 (c. 169 §3). Le canon 169 §3 disait : « Sauf le droit des hiérarques du lieu de dispenser, pour une grave raison, de d'autres éléments de la forme canonique dans la célébration du mariage, la dispense du rite sacré exigé dans les canons est réservée au Siège Apostolique ou au Patriarche qui ne l'accorderont que pour une grave raison ».

³¹ *Nuntia*, 15 (1982), 85-86 (c. 169 §3).

³² *Nuntia*, 24-25 (1987), 150 (c. 829).

³³ *Nuntia*, 28 (1989), 116-117 (c. 829).

³⁴ *Nuntia*, 29 (1989), 62.

le canon pour permettre aussi à un métropolitain à la tête d'une Église métropolitaine *sui iuris* de dispenser de la forme canonique. Des vingt-sept membres à qui on demandait s'ils approuvaient ou non le canon 829 du *SCICO*, tel qu'il était formulé, dix-huit (2/3) votèrent en faveur et neuf votèrent (1/3) contre. Par conséquent, les deux motions furent défaites et le canon 829 du *SCICO* fut par la suite promulgué, avec un changement de rédaction mineur³⁵, en tant que canon 835 du *CCEO*.

Tout compte fait, il semble maintenant approprié de reprendre la proposition faite par les quatre organismes consultatifs pendant la *denua recognitio* de l'ébauche du canon 832 §1 du *CCEO* qui considère la forme extraordinaire du mariage et d'exiger, pour la validité, la présence d'un prêtre qui assiste au mariage et le bénisse en un rite sacré. En conformité avec la reconnaissance et la protection du rite sacré du mariage dans la tradition orientale, il semblerait que le canon 832 §1 devrait être reformulé pour exiger la présence d'un prêtre pour la validité et le distinguer ainsi du canon 1116 §1.

2.3 — Le mariage assorti de conditions (c. 826 du *CCEO*; c. 1102 du *CIC*)

Alors que la législation latine antérieure (c. 1092 du *CIC* de 1917) permettait la célébration valide d'un mariage assorti de conditions portant sur le passé, le présent ou le futur, le canon 1102 du *CIC* interdit maintenant que des conditions portant sur le futur soient apposées. Il se lit ainsi :

- §1. Le mariage assorti d'une condition portant sur le futur ne peut être contracté valablement.
- §2. Le mariage contracté assorti d'une condition portant sur le passé ou le présent est valide ou non, selon que ce qui est l'objet de la condition existe ou non.
- §3. Cependant, la condition dont il s'agit au §2 ne peut être apposée licitement sans l'autorisation écrite de l'Ordinaire du lieu.

La norme orientale antérieure [*Crebrae allatae* (CA) c. 83] disait simplement : « Le mariage ne peut (*nequit*) être contracté sous condition ». Lors de ses réunions de 1977-1978³⁶, le *Cætus de matrimonio* a s'est demandé s'il était opportun de réintroduire le canon 83 de CA dans le Schéma oriental. Bien que ce canon semblait refléter l'ancienne tradition orientale qui

³⁵ *Nuntia*, 27 (1988), 58 (c. 829). Dans le canon, les mots « célébration du mariage » ont été ajoutés après le mot « forme ».

³⁶ Pour un rapport complet de ces réunions, voir *Nuntia*, 6 (1978), 34-41.

interdisait d'apposer des conditions à un mariage, le *Cætus* était conscient que la jurisprudence de la Rote romaine avait interprété *nequit* comme étant prohibitif et non pas invalidant. Si le canon 83 de *CA* demeurait le même, il ne serait pas considéré comme invalidant les mariages assortis d'une condition. Si on changeait le canon, il faudrait en faire une nouvelle ébauche afin de préserver la tradition orientale vieille de dix-huit siècles en cette matière. Toutefois, la question demeurait sans réponse jusqu'à ce qu'une norme fut proposée pour le Schéma 1980. À cet effet, le *Cætus* a reformulé le canon 161 du Schéma 1980 pour qu'il se lise comme suit : « Un mariage ne peut (*nequit*) être contracté sous condition; *si une condition est néanmoins apposée, elle est considérée comme n'ayant pas été faite, compte tenu du c. 159 §2 (CCEO c. 824 §2)* »³⁷. Les *Prænotanda* au Schéma 1980 expliquaient comme suit l'ajout de la clause (en italiques) au canon 83 du *CA* : « Cela n'a été fait qu'après beaucoup d'étude et de réflexion. Le consentement matrimonial n'est en aucune façon affecté par cette clause, mais l'acte même qui consisterait à simplement contester le mariage sur la base d'une condition apposée demeure complètement exclu »³⁸.

Pendant la *denua recognitio* du Schéma 1980, sept organismes consultatifs désapprouvèrent le canon 161, soit parce que le terme *nequit* ne demeurerait pas clair, soit parce que la clause qui avait été ajoutée n'était pas satisfaisante.

Cependant, le groupe d'étude n'était pas enclin à changer le canon pour le moment. On faisait particulièrement référence à la promulgation à venir de la norme latine parallèle (*CIC* c. 1102) qui disait, au §1 : « Le mariage assorti d'une condition portant sur le futur ne peut être contracté valablement ». Le groupe d'étude était d'avis que, si le législateur remplaçait *nequit* par *valide*, le problème d'interprétation de la norme orientale antérieure serait résolu. En même temps, ce simple changement dans la norme reflèterait très clairement l'ancienne tradition de l'Orient qui ne pouvait concevoir de mariages sujets à des conditions³⁹.

Lorsque le canon 1102 du *CIC* fut, en fait, promulgué, la *PCCICOR* emboîta le pas en réintroduisant le canon 83 de *CA*, mais en remplaçant *nequit* par *valide* dans la formulation. À la place du canon 161 du Schéma 1980, le canon 821 du *SCICO* stipulait donc clairement : « Le mariage ne peut être valablement célébré sous condition »⁴⁰. Aucune autre remarque sur

³⁷ *Nuntia*, 10 (1980), 50 (c. 161).

³⁸ *Nuntia*, 10 (1980), 14.

³⁹ *Nuntia*, 15 (1982), 79-80.

⁴⁰ *Nuntia*, 24-25 (1987), 148 (c. 821).

le canon 821 du *SCICO* ou aucune autre modification n'y fut apportée, ce qui fit en sorte qu'il devint le canon 826 du *CCEO*.

Sur la question des mariages assortis d'une condition, la différence entre les traditions orientales et latine est évidente. Dans les mariages entre catholiques orientaux, les parties ne peuvent conditionner leur consentement individuel à la célébration du sacrement. Autrement, la célébration du mariage est invalide. Selon la nouvelle norme latine, un mariage assorti d'une condition portant sur le futur est aussi invalide. Cependant, la discipline latine permet d'apposer une condition portant sur le passé ou le présent et le mariage sera valide ou invalide selon que l'objet de la condition existe ou non. Par exemple, dans un mariage entre catholiques latins, la condition suivante peut être apposée : « Je te marierai si tu n'as pas le SIDA ». S'il arrive que l'autre partie est atteinte du SIDA au moment de la célébration du mariage, il sera invalide.

Il se présente un problème lorsqu'il s'agit d'un mariage inter-rituel. Une partie catholique latine qui épouse une partie catholique orientale peut-elle apposer la même condition? Dans une éventuelle décision annulant le mariage, quel droit le juge du tribunal va-t-il appliquer? Joseph Prader a écrit que le consentement de chacune des parties est réglementé par le droit matrimonial qui lui est propre. Puisque les normes latines permettent qu'une condition portant sur le présent soit apposée, la partie catholique latine peut le faire et, en rendant sa décision, le juge se baserait sur le canon 1102 §2 du *CIC* et non sur le canon 826 du *CCEO*⁴¹. En répondant au même cas, Salachas maintient que la sentence judiciaire « doit s'appliquer par analogie, et avec encore plus de raison, au principe qui régit les empêchements » (*CCEO* c. 790 §2)⁴² déclare : « Le consentement matrimonial est un acte de la volonté par lequel un homme et une femme constituent le mariage; il s'agit d'un acte unitaire... »⁴³.

Toutefois, la question soulevée par la différence entre le canon 826 du *CCEO* et le canon 1102 du *CIC* ne concerne pas les empêchements, mais elle s'adresse plutôt aux conditions qui altèrent le consentement. Conséquemment, le canon 790 §2 du *CCEO* ne pourrait pas s'appliquer ici, non plus que le canon 826 du *CCEO* pourrait, semble-t-il, s'appliquer par analogie à la partie latine. Le juge d'un tribunal matrimonial ne pourrait recourir

⁴¹ J. PRADER, *La legislazione matrimoniale latina e orientale : Problemi interecclesiali, interconfessionali e interreligiosi*, Rome, Edizioni Dehoniane, 1993, 44.

⁴² Le canon 790 §2 dit ceci : « Même si l'empêchement n'affecte que l'une des parties, il rend cependant le mariage invalide ».

⁴³ D. SALACHAS, *Il sacramento del matrimonio nel Nuovo Diritto Canonico delle Chiese Orientali*, Rome/Bologne, Edizioni Dehoniane.

à l'analogie que là où, contrairement au cas soulevé par le canon 1102 du *CIC*, il y avait absence de normes latines se rapportant à des conditions attachées au consentement matrimonial (*CIC* c. 19; *CCEO* c. 1501). Bien qu'il soit vrai, par exemple, que l'acte unitaire de la célébration du mariage obéit nécessairement à une règle concernant la forme canonique, le consentement matrimonial est donné par les deux parties au mariage et est gouverné par la législation respective de chacune des parties⁴⁴. Il semblerait donc n'y avoir aucun doute que le juge d'un tribunal matrimonial, dans le cas de notre exemple, appliquerait le canon 1102 du *CIC* en rendant sa décision. Qui plus est, dans l'exemple donné, supposons que la partie catholique orientale n'est pas atteinte du SIDA et que le mariage est valide; mais cinq ans plus tard, le couple est lassé l'un de l'autre et des sacrifices que comporte le mariage. Un de leurs amis, qui a étudié le droit canonique oriental, déclare que le mariage peut très bien avoir été invalide puisqu'aucune condition ne devrait avoir été apposée, conformément au canon 826 du *CCEO*. Si le couple demandait l'annulation sous ce chef, cela ne constituerait-il pas une subversion pure et simple des règles et des principes établis par l'Église pour l'administration correcte de la justice?

Malgré cela, y compris l'exemple odieux que l'on vient tout juste de décrire, certains peuvent avancer que, pendant les années qui ont suivi la promulgation du Code oriental, on a débattu sur le fait que les deux Codes étaient interconnectés et qu'en fait, constituent deux parties intégrales d'un seul *corpus* de droit canonique de l'Église catholique. Ceci est particulièrement vrai dans le contexte de la célébration inter-ecclésiale des sacrements, comme le mariage. Si nous devons réellement examiner ensemble les deux Codes dans le cas où la partie latine d'un mariage appose une condition portant sur le présent et que la formulation du canon 826 du *CCEO* est tellement claire qu'elle exclut la célébration d'un mariage sous condition, peut-on dire des parties qu'elles contractent valablement? Même si ces questions et le débat continu qui les entoure nécessitent une réponse définitive, *De concordia inter Codices* ne résout pas les différences entre le canon 826 du *CCEO* et le canon 1102 du *CIC*. Dans leur préoccupation constante d'harmoniser les deux Codes, spécialement dans le contexte des relations inter-ecclésiales, le législateur ou le Conseil pontifical pour les Textes législatifs vont, sans aucun doute, être appelés à réconcilier ces différences en apportant une plus grande clarté sur le sujet de la célébration d'un mariage assorti d'une condition.

⁴⁴ Voir aussi : Joseph PRADER, « Il consenso matrimoniale condizionato », dans *Il matrimonio nel Codice dei canoni delle Chiese orientali* [Studi giuridici XXXII], Cité du Vatican, Libreria Editrice Vaticana, 1994, 281.

Conclusion

Dans sa lettre apostolique sous forme de *motu proprio De concordia inter Codices*, le pape François a exprimé sa constante préoccupation d'en arriver à une harmonisation entre les deux Codes de l'Église catholique. Par le Préambule de la lettre, suivi de onze articles, le Saint-Père a apporté des changements à un certain nombre de normes latines, réalisant ainsi une plus grande harmonie entre le Code latin et le Code oriental. Malgré le souci du pape d'en arriver à un degré de concordance adéquat entre les Codes, il a également reconnu que les Codes possédaient leur originalité propre qui les rendait mutuellement indépendants. Conséquemment, même si *De Concordia inter Codices* harmonisait un certain nombre de leurs normes parallèles, d'autres demeuraient souvent discordantes en raison des traditions différentes sur lesquelles se basaient les deux Codes séparés et distincts de l'Église universelle.

En ce qui concerne particulièrement les articles du *De Concordia inter Codices*, la 1^{re} Partie de cette étude se proposait d'examiner l'harmonisation réalisée entre les normes parallèles du Code latin et du Code oriental. La 2^{ème} Partie s'est ensuite penchée sur quelques questions non résolues qui ont été soulevées à la suite de la publication du *motu proprio*. Ces problèmes persistent et constituent un certain manque d'harmonie entre les deux Codes de l'Église. Dans le travail constant que poursuit la science canonique pour réconcilier les parties discordantes des Codes, particulièrement en ce qui a trait aux relations interecclésiales, les conseils du législateur et du Conseil Pontifical pour les Textes législatifs vont se révéler essentiels.

ANNEXE

LETTRE APOSTOLIQUE
SOUS FORME DE *MOTU PROPRIO*DU SOUVERAIN PONTIFE
FRANÇOIS*De concordia inter Codices*QUI MODIFIE CERTAINES NORMES DU CODE DE DROIT
CANONIQUE

PRÉAMBULE

En raison de notre préoccupation constante d'en arriver à une concordance entre les Codes, nous avons remarqué qu'il existait certains désaccords entre les normes du *Code de droit canonique* et le *Code des canons des Églises orientales*.

D'une part, les deux codes renferment des normes communes, mais d'autre part, leurs particularités propres les rend indépendants l'un de l'autre. Il est pourtant nécessaire que même pour les normes spéciales, il y ait un degré approprié de concordance. C'est que les désaccords, dans la mesure où ils pourraient exister, génèrent des inconvénients dans la pratique pastorale, surtout quand doivent être réglées les relations entre les fidèles appartenant à l'Église latine d'une part, et à une Église orientale d'autre part.

Cela arrive surtout aujourd'hui, quand, du fait du déplacement des populations, il s'ensuit que de nombreux fidèles orientaux demeurent dans les territoires latins. Cette nouvelle situation génère de multiples questions juridiques et pastorales qui demandent à être réglées par des normes appropriées. En particulier, on doit se rappeler que les fidèles orientaux sont tenus d'observer chacun son rite propre, où qu'ils se trouvent dans le monde (cf. CCEO c. 40 § 3 ; Conc. œcum. Vatican II, Décret *Orientalium Ecclesiarum*, n. 6); et, par conséquent, il appartient au plus haut degré à l'autorité ecclésiastique compétente de veiller à ce que soient mis à leur disposition des moyens appropriés qui leur permettront de s'acquitter de cette obligation (cf. CCEO c. 193 § 1 ; CDC c. 383 § 1 et 2 ; exhort. ap. post-synodale *Pastores gregis*, n. 72). L'harmonisation des normes est sans aucun doute un moyen qui aidera à favoriser le développement des vénérables rites orientaux (cf. CCEO c. 39), de sorte que les Églises *sui iuris* puissent exercer plus efficacement la charge pastorale.

On doit cependant avoir à l'esprit qu'il est nécessaire de reconnaître les caractéristiques particulières de la discipline du territoire où ces relations inter-ecclésiastiques se produisent. En effet, en Occident, qui est majoritairement latin, il

faut conserver un équilibre convenable entre la protection du droit propre de la partie orientale minoritaire et le respect qu'on doit manifester à l'égard de la tradition canonique historique de la partie latine majoritaire, afin que des confrontations inutiles et des conflits soient évités et que soit encouragée une fructueuse coopération de toutes les communautés catholiques habitant ce territoire.

Il existe aussi une autre raison pour que les normes du *CIC* soient intégrées et contiennent certaines dispositions expresses, parallèles à celles que renferme le *CCEO* et c'est l'exigence de définir avec plus d'exactitude les relations avec les fidèles qui relèvent d'Églises orientales non catholiques, lesquels sont présents en nombre croissant dans les territoires latins.

On doit aussi prendre en considération les travaux des canonistes qui ont constaté l'existence de certains désaccords entre les deux Codes et qui ont indiqué presque unanimement quelles étaient les principales difficultés et de quelle manière l'accord devait être rétabli.

Par conséquent, l'objectif des normes qui sont introduites par cette lettre apostolique sous forme de *motu proprio* est d'en arriver à une discipline unifiée qui puisse tracer une voie sûre à suivre dans chacun des cas particuliers au cours de l'exercice de la charge pastorale.

Le Conseil pontifical pour les textes législatifs, par le biais d'une commission d'experts en droit canonique oriental et latin, a identifié les questions qui paraissaient, plus que d'autres, requérir un ajustement législatif *ad hoc*; il a donc préparé un texte qui a été transmis à une trentaine de consultants et de canonistes du monde entier, ainsi qu'aux autorités des ordinariats latins pour les orientaux. Après avoir examiné toutes les observations reçues, le Conseil pontifical pour les textes législatifs a approuvé le nouveau texte en session plénière.

Tout cela considéré, nous décrétons ce qui suit :

Article 1. Le texte suivant remplace entièrement le canon 111 du Code de droit canonique, auquel un nouveau paragraphe est ajouté et dans lequel certaines expressions sont modifiées:

CIC §1. Ecclesiae latinae per receptum baptismum adscribitur filius parentum, qui ad eam pertinent vel, si alteruter ad eam non pertineat, ambo concordi voluntate optaverint ut proles in Ecclesia latina baptizaretur; quodsi concors voluntas desit, Ecclesiae sui iuris ad quam pater pertinet adscribitur.

CIC c. 111 §1. Par la réception du baptême, les enfants dont les parents relèvent de l'Église latine sont inscrits à cette Église ; il en est de même si l'un des parents n'en relève pas, mais qu'ils aient choisi tous les deux d'un commun accord de faire baptiser leur enfant dans l'Église latine ; en cas de désaccord, l'enfant est inscrit à l'Église *sui iuris* dont relève le père.

§2 *Si vero unus tantum ex parentibus sit catholicus, Ecclesiae ad quam hic parens catholicus pertinet adscribitur.*

§3 *Quilibet baptizandus qui quantum decimum aetatis annum expleverit, libere potest eligere ut in Ecclesia latina vel in alia Ecclesia sui iuris baptizetur; quo in casu, ipse ad eam Ecclesiam pertinet quam elegerit.*

§ 2. Si toutefois un seul des parents est catholique, il est inscrit à l'Église dont relève ce parent catholique.

§ 3. Après quatorze ans accomplis, tout candidat au baptême peut librement choisir d'être baptisé dans l'Église latine ou dans une autre Église *sui iuris* ; en ce cas, il relève de l'Église qu'il a choisie.

Article 2. Au canon 112 du Code de droit canonique est intégralement substitué le texte suivant, qui ajoute un nouveau paragraphe et change plusieurs expressions :

§1. *Post receptum baptismum, alii Ecclesiae sui iuris ascribuntur:*

1° *qui licentiam ab Apostolica Sede obtinuerit;*

2° *coniux qui, in matrimonio ineundo vel eo durante, ad Ecclesiam sui iuris alterius coniugis se transire declaraverit; matrimonio autem soluto, libere potest ad latinam Ecclesiam redire;*

3° *filii eorum, de quibus in nn. 1 et 2, ante decimum quartum aetatis annum completum itemque, in matrimonio mixto, filii partis catholicae quae ad aliam Ecclesiam sui iuris legitime transierit; adepta vero hac aetate, iidem possunt ad latinam Ecclesiam redire.*

§2. *Mos, quamvis diuturnus, sacramenta secundum ritum alius Ecclesiae sui iuris recipiendi, non secumfert adscriptionem eidem Ecclesiae.*

§3. *Omnis transitus ad aliam Ecclesiam sui iuris vim habet a momento declarationis factae coram eiusdem Ecclesiae Ordinario loci vel parrocho proprio aut sacerdote ab alterutro delegato et duobus testibus, nisi rescriptum Sedis Apostolicae aliud ferat; et in libro baptizatorum annotetur.*

§1. Après la réception du baptême, sont inscrits à une autre Église *sui iuris*:

1° qui en a obtenu l'autorisation du Siège Apostolique;

2° un conjoint qui, en se mariant ou pendant la durée du mariage, déclare passer à l'Église *sui iuris* de son conjoint; advenant la dissolution du mariage, il peut librement revenir à l'Église latine;

3° les enfants de ceux dont il est question aux nn. 1 et 2, avant leur quatorzième année accomplie, ainsi que, dans un mariage mixte, les enfants de partie catholique légitimement passée à une autre Église *sui iuris*; passé cet âge, ils peuvent revenir à l'Église latine.

§2. L'usage même prolongé de recevoir les sacrements selon le rite d'une autre Église *sui iuris* n'entraîne pas l'inscription à cette Église.

§3. Tout passage à une autre Église *sui iuris* entre en vigueur à partir de la déclaration faite devant l'Ordinaire du lieu, ou le curé propre de la même Église, ou un prêtre délégué par l'un ou l'autre et deux témoins, à moins que le rescrit du Siège Apostolique n'en dispose autrement ; il sera inscrit dans le registre des baptisés.

Article 3. Le texte suivant remplace entièrement le §2 du canon 535 du Code de droit canonique :

§ 2. *In libro baptizatorum adnotentur quoque adscriptio Ecclesiae sui iuris vel ad aliam transitus, necnon confirmatio, item quae pertinent ad statum canonicum christifidelium, ratione matrimonii, salvo quidem praescripto can. 1133, ratione adoptionis, ratione suscepti ordinis sacri, necnon professionis perpetuae in instituto religioso emissae; eaeque adnotationes in documento accepti baptismi semper referantur.*

§2. Dans le registre des baptisés, seront aussi annotés l'inscription à l'Église *sui iuris* et le passage à une autre Église *sui iuris*, et la confirmation, de même que ce qui a trait au statut canonique des fidèles, à savoir le mariage, restant sauves les dispositions du can. 1133, l'adoption, la réception d'un ordre sacré, et aussi la profession perpétuelle dans un institut religieux ; ces mentions seront toujours reportées sur le certificat de baptême.

Article 4. Le texte suivant est substitué intégralement au canon 868 §1, 2° du Code de droit canonique:

§1. 2° *spes habeatur fundata eum in religione catholica educatum iri, firma § 3; quae si prorsus deficiat, baptismus secundum praescripta iuris particularis differatur, monitis de ratione parentibus.*

§1. 2° qu'il y ait un espoir fondé que l'enfant sera éduqué dans la religion catholique, restant sauf le §3 ; si cet espoir fait totalement défaut, le baptême sera différé, selon les dispositions du droit particulier, et les parents informés du motif.

Article 5. Le canon 868 du Code de droit canonique aura un troisième paragraphe qui se lira comme suit:

§3. *Infans christianorum non catholicorum licite baptizatur, si parentes aut unus saltem eorum aut is, qui legitime eorundem locum tenet, id petunt et si eis corporaliter aut moraliter impossibile sit accedere ad ministrum proprium.*

§3. L'enfant de chrétiens non catholiques est baptisé licitement, si les parents, ou au moins l'un d'eux, ou celui qui tient légitimement leur place, le demandent et s'il leur est physiquement ou moralement impossible d'avoir accès à leur propre ministre.

Article 6. Le canon 1108 du Code de droit canonique aura un troisième paragraphe qui se lira comme suit:

§3. *Solus sacerdos valide assistit matrimonio inter partes orientales vel inter partem latinam et partem orientalem sive catholicam sive non catholicam.*

§3. Seul le prêtre assiste validement au mariage entre des parties orientales, ou entre une partie latine et une partie orientale qu'elle soit catholique ou non.

Article 7. Le texte suivant remplace intégralement le canon 1109 du Code de droit canonique:

Loci Ordinarius et parochus, nisi per sententiam vel per decretum fuerint excommunicati vel interdicti vel suspensi ab officio aut tales declarati, vi officii, intra fines sui territorii, valide matrimonii assistunt non tantum subditorum, sed etiam, dummodo alterutra saltem pars sit adscripta Ecclesiae latinae, non subditorum.

L'Ordinaire du lieu et le curé, à moins qu'ils n'aient été, par sentence ou par décret, excommuniés ou interdits ou suspens de leur office ou déclarés tels, assistent valablement, en vertu de leur office, dans les limites de leur territoire, aux mariages non seulement de leurs sujets, mais aussi, pourvu que l'une des parties au moins soit inscrite à l'Église latine, de ceux qui ne le sont pas.

Article 8. Au canon 1111 §1 du Code de droit canonique est intégralement substitué le texte suivant:

§ 1. Loci Ordinarius et parochus, quamdiu valide officio funguntur, possunt facultatem intra fines sui territorii matrimonii assistendi, etiam generalem, sacerdotibus et diaconis delegare, firmo tamen eo quod praescribit can. 1108 § 3.

§1. L'Ordinaire du lieu et le curé, aussi longtemps qu'ils remplissent valablement leur office, peuvent déléguer aux prêtres et aux diacres la faculté, même générale, d'assister aux mariages dans les limites de leur territoire, restant sauf toutefois ce que prescrit le can. 1108 § 3.

Article 9. Le texte suivant remplace intégralement le §1 du canon 1112 du Code de droit canonique:

§1. Ubi desunt sacerdotes et diaconi, potest Episcopus dioecesanus, praevis voto favorabili Episcoporum conferentiae et obtenta licentia Sanctae Sedis, delegare laicos, qui matrimonii assistant, firmo praescripto can. 1108 § 3.

§1. Là où il n'y a ni prêtre ni diacre, l'Évêque diocésain, sur avis favorable de la conférence des Évêques et avec l'autorisation du Saint-Siège, peut déléguer des laïcs pour assister aux mariages, restant sauves les dispositions du can. 1108 § 3.

Article 10. Un troisième paragraphe est ajouté au can. 1116 du Code de droit canonique, lequel se lira comme suit:

§3. In iisdem rerum adiunctis, de quibus in §1, nn. 1 et 2, Ordinarius loci cuilibet sacerdoti catholico facultatem conferre potest matrimonium benedicendi christifidelium Ecclesiarum orientalium quae plenam cum Ecclesia catholica communionem non habeant si sponte id petant,

§3. Dans les mêmes circonstances qu'au § 1, 1^o et 2^o, l'Ordinaire du lieu peut conférer à tout prêtre catholique la faculté de bénir le mariage des fidèles des Églises orientales qui ne sont pas en pleine communion avec l'Église catholique, s'ils le demandent spontanément et

et dummodo nihil validae vel licitae celebrationi matrimonii obstet. Idem sacerdos, semper necessaria cum prudentia, auctoritatem competentem Ecclesiae non catholicae, cuius interest, de re certiore faciat.

pourvu que rien ne s'oppose à la célébration valide ou licite du mariage. Néanmoins, le prêtre en informera, toujours avec la prudence nécessaire, l'autorité compétente de l'Église non catholique concernée.

Article 11. Le texte suivant remplace intégralement le can. 1127 §1 du Code de droit canonique :

§1. Ad formam quod attinet in matrimonio mixto adhibendam, servantur praescripta can. 1108; si tamen pars catholica matrimonium contrahit cum parte non catholica ritus orientalis, forma canonica celebrationis servanda est ad licitatem tantum; ad validitatem autem requiritur interventus sacerdotis, servatis aliis de iure servandis.

§1. En ce qui concerne la forme à observer dans le mariage mixte, les dispositions du can. 1108 seront suivies ; cependant, si la partie catholique contracte mariage avec une partie non catholique de rite oriental, la forme canonique de la célébration doit être observée pour la licéité seulement ; mais pour la validité est requise l'intervention d'un prêtre, en observant les autres règles du droit.

Et tout ce que nous avons décidé par cette lettre apostolique en forme de motu proprio, nous ordonnons que cela demeure ferme et stable, nonobstant toutes choses contraires, mêmes dignes de mention particulière et nous décrétons que cela soit promulgué par publication dans le quotidien L'Osservatore romano et ensuite édité dans les Acta Apostolicæ Sedis.

Donné à Rome, près de Saint-Pierre, le 31 mai de l'année 2016, la quatrième de notre pontificat.

François, pape

ONE HUNDRED YEARS SINCE THE 1917 CODE OF CANON LAW*

JOHN A. ALESANDRO**

SUMMARY — This study situates the promulgation of the 1917 Code and its revision in 1983 within the context of the development of canon law through its three principal epochs: prior to the *Decretum Gratiani*, from Gratian to Trent, and from Trent to 1917. The first codification was a remarkable feat brought about by the herculean efforts of Pope Pius X and Cardinal Pietro Gasparri. For the first time in the Church's history, it presented a streamlined, exclusive and authoritative presentation of the Church's laws modelled on the Napoleonic codes. Its revision in 1983 was no less significant insofar as it sought to implement in canonical terms the reform brought about by Vatican Council II. Nor has canon law stood still since then. With many changes of the law already promulgated and more to come, there is a need constantly to update the Code and, at some point, it will surely be necessary to reorganize the canons and start over again, perhaps with an even more unique style of law.

RÉSUMÉ — Cette étude situe la promulgation du Code de 1917 et sa révision en 1983 dans le contexte du développement du droit canonique selon ses trois grandes époques : avant le *Decretum Gratiani*, de Gratien à Trente et de Trente à 1917. La première codification a été un exploit remarquable réalisé à l'aide des efforts herculéens du pape Pie X et du cardinal Pietro Gasparri. Pour la première fois dans l'histoire de l'Église, elle présentait de manière organisée, exclusive et autoritaire les lois de l'Église, modelées selon les codes de Napoléon. Sa révision en 1983 n'était pas moins significative en ce qu'elle cherchait à mettre en vigueur en termes canoniques la réforme effectuée par le deuxième concile du Vatican. Et le droit canonique ne s'est pas immobilisé depuis. Avec les nombreuses modifications à la loi

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déjà promulguées et d'autres encore à venir, il est nécessaire de constamment mettre le Code à jour. À un moment donné, il sera sûrement nécessaire de réorganiser les canons et recommencer, peut-être dans un style de droit encore plus unique.

Introduction

As the theme of this Convention celebrates, a century ago today the Church was halfway through the *vacatio legis* of the first codification of canon law in its history. The story of that codification, which occurred seventeen years after the beginning of the twentieth century and its major revision just seventeen years before the end of the same century, started long before that. Just about eight hundred years earlier, a Camaldolese monk who had studied the Church's documents as assiduously as he could, given the manuscripts at his disposal, decided to develop a more systematic approach to the laws that governed Church life and discipline.

Magister Gratianus was in the thick of the medieval intellectual Renaissance. He was undoubtedly influenced by the recently disseminated dialectic method of Peter Abelard's *Sic et non* (1079-1142), which first appeared around 1121, just as Gratian was occupied in his legal research and writing.¹ Gratian also was reaping the rewards of the reform-minded Pope Gregory VII of the previous century, for one of the most important tools of the Pope's effort was the amassing of relevant Church documents of the past.

Gratian was the right scholar at the right time. He had the benefit of previous like-minded miners of the Church's treasury of documents and made the most of them. However, what he faced was a herculean task: sifting through not only variant readings but truly contradictory laws and even spurious texts. In his monastic cell, he was required to pick and choose, to correct and revise, to authenticate, to reorder and to present in a systematic way a millennium of decrees, decretals, canons, chapters and assorted papal, provincial and synodal documents.

One title given to his monumental work was the simple word *Decretum*. Gratian himself used *Concordia discordantium canonum*. The drafting of the recent *De concordia inter Codices* was child's play in comparison with the writing of Gratian's *Concordia*, which he completed around 1141. It soon became the standard text for those studying canon law, which had emerged

¹ The latest recension of Abelard's work was completed around 1132, about ten years before Gratian's *Decretum*.

in Bologna and elsewhere as a science separate from theology and from civil law. The *Decretum Gratiani* remained a primary source of the Church's laws for centuries, up to the 1917 Code.

Traditionally, the development of canon law prior to codification was divided into three epochs: *ius antiquum*, the old law, from Apostolic times to Gratian's *Decretum*; *ius novum*, the new law, from Gratian's *Decretum* to Trent; *ius novissimum*, the modern law, from Trent to the Code of 1917. In 1918, the Benedictine scholar, Charles Augustine, wrote: "It remains to be seen whether the New Code will constitute a new epoch."² We might respond: "It has—and a subsequent epoch is well underway!" But, let us look very briefly at those earlier epochs.

1 — *The Ius Antiquum*

Gratian capped a movement toward systematization that had progressed slowly over the previous millennium, coming to the fore every so often in the Church's history, usually in connection with Church reform and renewal.

1.1 — The Apostolic Church

There is no question that Church law made its appearance early on in the fledgling Christian community. St Paul, while vehemently rejecting the Mosaic law, was a prolific legislator himself. Canonists need think simply of I Corinthians 7 and his initiation of what eventually came to be called "the Pauline privilege" to see the extent of his legal decision-making. The narrative of the meeting in Jerusalem to solve the neuralgic Gentile question was another indication that the Christian community quickly had to set down rules to survive and expand—and it did so, even invoking the authority of the Holy Spirit for what we might call the first general dispensation. "It is the decision of the Holy Spirit, and ours too, not to lay on you any burden beyond that which is strictly necessary" (Acts 15:28).

Soon, many rules and regulations emerged from local synods, such as the Synod of Elvira in 300 AD. Some were quite rigorous: *Canon 5* – "If a woman beats her servant and causes death within three days, she shall undergo seven years' penance if the injury was inflicted on purpose and five years' if it was accidental. She shall not receive communion during this

² C. AUGUSTINE, *A Commentary on the New Code of Canon Law*, vol. 1, St. Louis and London, B. Herder Book Co., 1921, 4.

penance unless she becomes ill. If so, she may receive communion.” The punishment of clerics who misbehaved far surpassed *Sacramentorum sanctitatis tutela*. *Canon 18* – “Bishops, presbyters, and deacons, once they have taken their place in the ministry, shall not be given communion even at the time of death if they are guilty of sexual immorality. Such scandal is a serious offense.” On the other hand, mercy was also apparent, particularly during the dog days of summer on the Iberian peninsula. *Canon 23* – “In order to help those who are weak, the rigorous fasting that requires no eating for a whole day shall be dropped during the months of July and August.” These are just a few examples. Many such rules and regulations were collected and exchanged throughout the Mediterranean basin.³

1.2 — Roman Law

With the Edict of Constantine in 313, the Church emerged from the catacombs and began to interact officially with the State. Eventually a cohesive form of Christendom arose—sometimes, at least if viewed somewhat anachronistically, a mite *too* cohesive. During this period, the homogeneous relation of secular and religious affected ecclesiastical law significantly.⁴ Roman law was organized by emperors such as Justinian and, alongside secular regulations, many of the Church’s early laws found their way into the *Corpus Iuris Civilis* (the *Institutiones*, *Digesta*, *Codex*, and *Novellae*). This interaction went both ways: bishops were called to serve as arbiters of disputes or in other secular capacities as people distrusted governmental praetors, judges and civil officials. Moreover, the Church’s legislation “greatly tempered the rigor of Roman law; in many instances she made Roman law harmonize with the doctrine and precepts of the Christian religion”⁵ (e.g., in regard to marriage).

1.3 — Germanic Tribes

The migration of the various tribes from the north and east, taking over the crumbling Roman Empire, was another significant event for Church law.

³ For example, the fifth century collection *Constitutiones Apostolorum* brought together the *Doctrina XI Apostolorum*, the *Didascalia Apostolorum*, and the *Canones Ecclesiastici Apostolorum*, to which were added the *Canones Hippolyti*. See *ibid.*, 20.

⁴ The term “ecclesiastical law” dates back to the anonymous treatise *De singularitate clericorum*, published in Rome between 363 and 375. The Decretists commonly interchanged the two: *ius canonicum* and *ius ecclesiasticum*. Gratian himself called ecclesiastical laws “canons.”

⁵ A.G. CICOGNANI, *Canon Law*, Philadelphia, PA, Dolphin Press, 1934, 48-49.

These tribes quickly converted to Christianity, but their customs and laws had to be incorporated and harmonized with the Church's doctrine and tradition.⁶ By this time, Church laws had multiplied enormously, consisting of the chapters and canons of Councils like Nicaea, Chalcedon and Ephesus, writings of the Western and Eastern Fathers, and papal decretals responding to pastoral questions, particularly about the sacraments. As early as 500, the Scythian monk Dionysius Exiguus ("Short Dennis") collected and translated into Latin 213 conciliar Greek canons and other canons and decretals for future reference.⁷

1.4 — Feudalism

Somewhat ironically, the closeness of Church and society was fortified by the ensuing fragmentation of society. The *Pax romana* was no more. Without a single Roman culture, Roman law was soon lost. While politics became very local, in the hands of various kings, princes and lords, the Church remained a fairly consistent source of unity. Many documents were lost, but the monasteries preserved a good number of manuscript collections. Life went on and determinations about Church matters continued, though isolated.

A paradigm of localization in Church matters was the development of the penitential books in Ireland and England, where the abbot was the spiritual and secular father of the entire community, more than any mayor or lord. Some advice to confessors varied widely from the ancient teaching and discipline, particularly in the area of marriage. Irish and English missionaries brought these legal/pastoral guides to the Continent, leading to the juxtaposition in collections of differing and sometimes contradictory texts.

⁶ Certain provisions were borrowed, as with consanguinity: CIC/17 c. 96. The principle of territoriality was another, based on the Germanic feudal system: CIC/17 c. 8 §2 – Laws are presumed not to be personal (as was true in Roman law) but territorial, unless the law indicates that it is a personal law.

⁷ "In earlier ages, canonical collections were nothing other than the laws themselves, especially those laid down by Councils, arranged in chronological order; among these, one ancient collection of canons from the oriental Councils, especially Nicaea, stands out and is considered the source or font of nearly all the collections of ancient laws that appeared. Dionysius Exiguus translated this into the Latin language and additionally collected those outstanding decretal letters of the Roman Pontiffs that were drafted in the 4th and 5th centuries." P. GASPARRI, *Preface* to the 1917 Code, English translation in E.N. PETERS (ed.), *The 1917 Pio-Benedictine Code of Canon Law*, San Francisco, Ignatius Press, 2001, 1.

1.5 — Carolingian Reform

During the ninth century, a movement occurred that significantly affected canon law. The renewal was symbolized by the Pope's crowning of Charlemagne as Holy Roman Emperor on Christmas day 800. The Carolingian reform sought to stabilize the structures of Christendom, and one of its primary tools was Church law. Consequently, the second generation of Carolingian scholars researched Church law to foster this reform movement. In the end, however, texts remained scattered, disparate, and sometimes contradictory.

"The ninth century was rife with fabrications, not only in hagiography, but also in Canon Law."⁸ One particularly zealous group, probably in northern or northwest France, decided to foster the spirit of canon law by creating their own texts and passing them off as ancient collections, attributed to Isidore Mercator. These *Pseudo-Isidorian Decretals*, written between 847 and 852, supplemented and interpreted the existing body of ecclesiastical law to defend clergy and church possessions against the designs of feudal lords, a dynamic that was heating up. The secular-religious unity was suddenly in tension. One of the strategies of the *False Decretals* was to emphasize the powers, prerogatives and supremacy of the pope over local authorities and synods, in accord with the Carolingian ideal of the Empire united under ecclesiastically approved authority. In the end, the forces of disintegration were too strong, and the effort was unsuccessful. Strangely, the fact that the texts were clever forgeries remained undiscovered for seven centuries, long after Gratian. They did have one good effect, however: preserving, along with other legitimate collections, the spirit, if not the letter, of the ancient discipline.

1.6 — Gregorian Reform

As the early Middle Ages receded, an intellectual renaissance occurred. Many manuscripts were discovered in the monasteries. New scholars undertook the task of collecting texts: e.g., Hincmar of Rheims, Burchard of Worms; Ivo of Chartres. There were some attempts at systematization, yet discrepancies, variant readings, and even outright contradictions emerged in all this raw material, and were often simply left there side-by-side.

By the eleventh century, the stage was set for Hildebrand, Pope Gregory VII (1073-1085). Tension within the secular-religious unity of Christendom

⁸ AUGUSTINE, *Commentary*, 23.

was proving disadvantageous and even dangerous to the Church. The noble dream of “one faith, one people” had become a caricature. The power struggle with the secular princes was constant. Gregory and his successors were ecclesiastical reformers. In a sense, Hildebrand tried to bring his monastic Cluniac reform to the whole Church. In this effort, canon law helped to define the Church and reinforce its unique rules and its special ecclesiastical norms, with the aim of disentangling the Church from secular control.

The lay investiture controversy, focusing on Gregory and Henry IV, was not merely about honor and precedence. It really initiated a new paradigm: the spiritual order was truly the proper and exclusive domain of the Church, a domain that could be neither ignored nor controlled by secular authorities. Eight hundred years later, the elements of that Gregorian Reform reached its logical denouement with the image of Church and State as two separate “perfect societies,” the philosophy underlying the 1917 Code of Canon Law.

2 — *The Ius Novum and Ius Novissimum*

2.1 — *Decretum Gratiani*

Gregory VII arranged for all the known archives of Italy to be searched for texts treating topics such as papal supremacy, the freedom of the Church and clerical celibacy. Some Gregorian followers, like Anselm of Lucca, tried their best to systematize the results, but it remained a massive problem in the reform movement. Gratian’s *Concordia Discordantium Canonum* was the first successful attempt to provide a comprehensive synthesis of the Church’s laws.⁹ Gratian’s dialectical method was similar to that used contemporaneously by the theologian Peter Lombard in Paris and later employed by Thomas Aquinas and the Scholastics of the thirteenth century.

Gratian took it upon himself to analyze the texts, weed out what he considered variant readings, and provide solutions to contradictions and

⁹ “The materials that Gratian took most abundantly for his *Decretum* came from all of the collections that had come before; innumerable canons of Synods and Decretals of the Pontiffs, and more than enough rescripts, to which he added excerpts of sacred Scripture and works of the holy Fathers [of the Church] and ecclesiastical writers; he even culled things taken from books by the Roman Church and other particular Churches, including the *Roman ordo*, the *Daily Book of the Roman Pontiffs*, and likewise some things from the [Irish] penitential books; finally he took not a few citations from Roman and Germanic law”, GASPARRI, *Preface*, in PETERS (ed.), *1917 Pio-Benedictine Code*, 2.

discrepancies. In addition, he ordered them under three general categories: *De personis*, *De causis*, and *De sacramentis*. The *Decretum* of Gratian had the effect of bringing ecclesiastical law into one systematic collection, paring down extraneous texts and focusing the study of canon law in a way never done previously.¹⁰ With the *Decretum*, canon law was seen as a science in the classical sense.¹¹ Nonetheless, the Church did not stand still, nor did its proliferation of laws. Decretists commented on Gratian and decretalists on ensuing collections of the Popes' writings. Popes continued to offer authoritative solutions to new cases submitted to them and general councils were held at the Lateran in 1179 and 1215, producing their own canons.

2.2 — Gregory IX and Later Collections

Within a century of Gratian, new texts were so numerous that Gregory IX commissioned Raymond of Peñafort to organize a new collection, which incorporated five Books of Decretals, with over 2,000 papal and conciliar decrees grouped in five general categories.¹² This was the *Liber extra*, the book "outside of" the *Decretum* (1234). In an attempt to have some clarity (a move that foreshadowed the 1917 codification), all collections published after the *Decretum* of Gratian were abrogated by Gregory IX, who also prohibited the preparation of other collections without the authorization of the Apostolic See. Yet, he did not abrogate the *Decretum* of Gratian, which remained a private collection of laws.

¹⁰ "With the *Decretum*, the canonists became legists rather than theologians. So celebrated did the lectures at Bologna become that students from all the nations of Europe thronged to hear them, sometime to the number of 10,000", CICOGNANI, *Canon Law*, 283. The *Decretum* was among the earliest books mechanically printed, e.g., 20 years after Gutenberg in Strassburg (1471). Of course, the *Decretum* always remained a "private" collection, not an authoritative one. Cardinal Gasparri: "Gratian's Decree at no time received public authority, and, even though the Apostolic See amended and published it, it did not take responsibility for it and never declared it authentic or conferred the force of law on the canons as a whole or on the individual [provisions] that comprised it... The canons placed in Gratian's Decree are thus shown never to have received any authority beyond what they had from their source...", GASPARRI, *Preface*, in PETERS (ed.), *1917 Pio-Benedictine Code*, 3.

¹¹ Canon law relates to the "legal sciences" "because of the similarity of their subject-matter, community of principles, methods and terminology and also reciprocal influence. In point of fact, canon law belongs essentially to the legal sciences. However, we must not rank canon law as a mere human juristic science to be developed on naturalistic principles alone, since it draws largely from divine revelation", CICOGNANI, *Canon Law*, 46-47.

¹² "Cardinal Ugolino, at the advanced age of eighty-two years, succeeded to his uncle, Pope Honorius III, who had raised him to the purple. He took the name of Gregory IX (1227-1241)." He reigned for nearly fifteen years. *Ibid.*, 298.

Within sixty-four years, however, laws had multiplied to the point of requiring the *Liber sextus* of Boniface VIII (1298), a “sixth” book in addition to the five of Gregory IX. John XXII’s *Constitutiones Clementinae* were added in 1317 in Avignon. Finally, in 1500, these works along with two smaller collections of decretals (the wandering ones, *extravagantes*) were combined by Joannes Chappuis into the *Corpus Iuris Canonici*, another symbolic statement of independence and equality of the Church, paralleling Justinian’s *Corpus Iuris Civilis*.¹³

2.3 — The Council of Trent

The Council of Trent, the doctrinal and disciplinary response to the Reformers, began about fifty years after Chappuis’ work. It issued many practical disciplinary norms, once again using canon law to reform the Church. It was possible because of the highly centralized legislative structure of the Church, hearkening back to the implicit goal of the Gregorian reform of the eleventh century. In the spirit of Gregory IX, the papacy attempted to limit the proliferation of canonical interpretations by prohibiting commentaries on Tridentine legislation without Rome’s approval. The conciliar decrees were promulgated by Pope Pius IV and went into effect on 1 May 1564. That same year, the Congregation for the Council was established to offer authoritative interpretations of the decrees. Other Roman dicasteries also developed, all issuing decrees and decisions for the universal Church. The Tridentine process of centralization ended up once again multiplying universal rules and regulations.

2.4 — Conclusion

In all, the 683 years from the Decretals of Gregory IX in 1234 until 1917 was a period of free study of the law, imitating the Gratian style by abandoning the ancient chronological order and employing a legal order of titles, but not always the same system. *Summae* appeared in the thirteenth century and *Compendia* in the 16th century, which ordered laws in different ways depending on use (e.g., canonical education, guides to ministry, student texts). New critical editions of the *Corpus Iuris Canonici* emerged. The Gallic method of

¹³ Pope Gregory XIII (1572-1585), in the Constitution *Cum pro munere* on 1 July 1580, ordered that this *Corpus Iuris Canonici* of private and authoritative collections be accurately republished in its entirety. This was not a “closed” *corpus*, in the sense that no new laws could be added. Nonetheless, no new official collections emerged between the *Clementinae* and the Council of Trent. See *ibid.*, 318-319.

ordering law was distinct from the Italian method, and many of Trent's laws were not even included in the digests and compendia of the period.

3 — *The 1917 Code of Canon Law*

3.1 — Vatican I

Three centuries elapsed after Trent until Vatican I (1869-1870). Prior to its convocation, Church-State interaction was undergoing a *revolutionary* change. Political revolution was the hallmark of the hundred years preceding Vatican I, beginning with the French Revolution, continuing in the European revolutions of 1848 and even affecting Vatican I itself. In 1870, the Italian *risorgimento* led by Giuseppe Garibaldi and Vittorio Emmanuele suddenly and permanently interrupted the Vatican I's sessions. On September 20, the Kingdom of Italy captured Rome and on October 20, Pius IX suspended Vatican I. Although the Council approved constitutions on faith, revelation and papal infallibility, many agenda items of the truncated Council were left unattended, among which was the reform of canon law, a task left to Pius IX's successors.

3.2 — The Napoleonic Codes

While these traumatic events were occurring in the Church, secular society was experiencing an upheaval, and law was at the center of it. Laws and decisions beyond the *Corpus Iuris Civilis* had multiplied, not to mention the statutes and ordinances in cities. It was almost impossible to know what laws were in force. Authority was eventually given to "the common opinion" as a way of having some order (somewhat similar to the rule of "probablism" in moral theology, the guidance of the *doctores et magistri*). But the academic arguing of the professors often undermined such "commonality." Back in the seventeenth century, Francis Bacon had already recommended the publication of a new "Digest" and Gottfried Wilhelm Leibniz had called for "a new code that will be brief, clear, and sufficient." In 1774, the tribunal in Naples actually forbade parties to cite authors of law in forensic controversies to avoid confusion.¹⁴

In 1804, Napoleon perfected a new style of civil Code with no reference to old legislation. This was part and parcel of his overall aim to do away with

¹⁴ Ibid., 417.

the old order, the *ancien régime*. His armies carried the Code to Spain, Belgium, Holland and some Italian States. While his Code temporarily fell with his downfall, the seed was sown for modern civil legislation: Austria in 1811, Lombardy and Venice in 1816, the Kingdom of the Two Sicilies in 1817, Germany in 1896 and Switzerland in 1905.

Interestingly, prior to the reform of canon law, even the Papal States as a secular entity followed suit to a certain degree: a partial codification of civil law under Pius VII in 1817 (civil procedure) and in 1821 (commerce), and under Gregory XVI in 1832 (penal law) and in 1834 (legislative and judiciary rules). These civil law developments “prompted and recommended the codification of canon law.”¹⁵

3.3 — Pius X and Gasparri

Decades after Vatican I’s abrupt suspension, Pius X set out to pursue the abandoned task of reforming canon law, establishing on 19 March 1904, a commission of cardinals to develop a single authoritative collection of all the extant laws of the Latin Church. This monumental task would differ from all collections of the past in that it would be *completely authoritative* and its laws would be *exclusive*. Up to this point, authoritative and private collections of laws existed side by side, sometimes in the same volume. Even the *Corpus Iuris Canonici*, which was already outdated, was mixed; it could not claim to be a single authoritative collection. Exclusivity of universal ecclesiastical law would be achieved by modeling this revision on the Napoleonic civil law codes that had emerged throughout continental Europe. Ancient laws would no longer be in force. They would be re-promulgated word for word or in some modified form. The old law would no longer be “the law”; it would now be viewed solely as “the source” of the extant law.

Some of this work had already begun: (1) postulates of prelates before and after Vatican I; (2) the work of individual canonists, writing articles and even codices (e.g. Colomiatti in 1888); (3) the redactions of laws in provincial and plenary councils; (4) Pontifical Constitutions in the late nineteenth and early twentieth centuries ordered their material under headings in a codified format.¹⁶ Pius X himself promulgated certain pre-Code legislative

¹⁵ Ibid., 418.

¹⁶ *Apostolicae Sedis* of Pius IX, reducing the number of *latae sententiae* censures in 1869; the *Officiorum ac munerum* of Leo XIII on censure and prohibition of books in 1897; the *Conditae a Christo* of the Congregation of Bishops and Regulars in 1900 to handle disciplinary and criminal causes of clerics.

documents, somewhat similar to the post-conciliar legislation that would be promulgated after Vatican II.¹⁷ This was all fodder for the new codification.

The task of producing a single Code was put in the hands of Pietro Gasparri (1852-1934), then Secretary of the Sacred Congregation of Extraordinary Affairs.¹⁸ Pius X issued the Decree of Codification on 19 March 1904 (*Arduum sane munus*)¹⁹ and named a Pontifical Commission of initially sixteen Cardinal Codificators. To this Commission was attached a *coetus consultorum*. Gasparri was named General Secretary of the Commission and President of the consultors. In 1907, he was made a Cardinal and appointed Ponens or Relator of the Commission, while retaining the presidency of the consultors. Gasparri was for Pius X what Raymond of Peñafort was for Gregory IX.

3.4 — The Process

The process took thirteen years to complete, and much of the work was done by Consultors and other expert “collaborators” who, admits Gasparri, “provided outstanding assistance.”²⁰ To show the importance of their work,

¹⁷ *Ne temere* on the canonical form of marriage in 1907; *Sapienti consilio* on the Curia in 1908, *A remotissima* on *ad limina* visits and reports in 1909; and *Maxima cura* on the administrative removal of pastors.

¹⁸ Pietro Gasparri was born the youngest of nine children of Bernardino Gasparri and Giovanna Sili in the village of Ussita on 5 May 1852. In 1870, when Vatican I was interrupted, Gasparri was only eighteen years old. He held doctorates in philosophy, theology and canon law, serving as a professor of canon law in both Rome and Paris, a recognized expert in matrimonial law. He served briefly as Apostolic Nuncio in Latin America before being appointed as Secretary for Extraordinary Ecclesiastical Affairs in 1901. J.T. NOONAN, Jr., *Power to Dissolve: Lawyers and Marriages in the Courts of the Roman Curia*, Cambridge, MA, Belknap Press of Harvard University Press, 1972, 159-163.

Gasparri related a conversation with Giuseppe Sarto, Pope Pius X, within a week of his election. *Pius X*: What do you want to do here now? *Gasparri*: I want to make a code of canon law, Most Blessed Father. *Pius X*: Can you do it? *Gasparri*: Yes, Most Blessed Father, it can be done. Certainly, it is a long and difficult work, but it will be of immense utility to the Church. *Pius X*: Let's do it. If We cannot promulgate it, Our successor will. P. GASPARRI, “Storia della codificazione del diritto canonico per la Chiesa latina,” in *Acta Congressus Iuridici Internationalis*, Rome, 1937, IV, 4.

¹⁹ The Decree ordered that “the laws of the universal Church published up to this time, arranged in a clear order, could be collected into one, removing from there those that were abrogated or obsolete, and with the others, where this is necessary, being accommodated to the conditions of our own times”, GASPARRI, *Preface*, in PETERS (ed.), *1917 Pio-Benedictine Code*, 13.

²⁰ *Ibid.*, 15. On 6 April 1904, Gasparri wrote to ecclesiastical universities to collaborate in the Commission's work by redacting into articles or canons part of the canon law. CICOGNANI, *Canon Law*, 422.

Gasparri arranged certain perks for them: "Consultors who were bound by choir service, lest by the performance of their duties they suffer any losses, should be absent from choir for the time necessary for meeting, though they nevertheless should enjoy the distributions made to those considered *present*."²¹

Gasparri employed an interesting technique: Each topic was addressed by a pair of Consultors or Collaborators or perhaps three or four "but in such a way that one would not know the name of the other or others who were writing about the same subject."²² The process involved a great deal of secrecy, despite fairly widespread consultation and collaboration. "The work went on silently, and the secret to which all were solemnly bound, made it almost impossible for newspapers to get correct information. What leaked out came chiefly from the Ordinaries who had received copies of the preliminary code made up of several books for discussion at their meetings."²³

Unlike previous collections, this codification would be a new, streamlined and exclusive presentation of the Church's laws. It would be limited to disciplinary laws, without extensive doctrinal explanations, and all obsolete laws would be omitted. The critical apparatus would show the laws' sources and when needed, the current law would be amended in the drafting itself.²⁴ The official process involved, at least in theory and given the transportation and communication challenges of the time, a rather sophisticated method of scientific critique and pastoral consultation with bishops and religious superiors throughout the world.²⁵

²¹ GASPARRI, *Preface*, in PETERS (ed.), *1917 Pio-Benedictine Code*, 16.

²² *Ibid*.

²³ AUGUSTINE, *Commentary*, ii.

²⁴ The rules for developing codification were stated as follows.

1. Only laws about discipline although principles of natural justice or the faith could be worked into the Code.
2. Omit obsolete or abrogated laws from the CIC, Trent, acts of the popes, and decrees of the Congregations or Tribunals and distill the rest into canons that contain only the dispositive part of the law and subdivided into paragraphs.
3. Create a critical apparatus of sources and interconnection.
4. When the experts disagree, pick one of the opinions and establish it definitively.
5. Change the current law if justified and give reasons for it.
6. Put all in Latin. GASPARRI, *Preface*, in PETERS (ed.), *1917 Pio-Benedictine Code*, 16-17.

²⁵ In his *motu proprio Arduum sane munus*, Pius X called for consultation with the entire episcopate (25 March 1904 circular letter): "We also desire that the universal Episcopate, according to opportune norms to be given, will contribute to and concur in this most grave work." Archbishops were to consult with their suffragans to send within four months what new laws and modifications they deemed necessary or desirable. Universities were asked on April 6, 1904 to do the same. "The episcopate, the superiors of religious orders and

Gasparri himself was on top of everything being developed. He admitted that, in perusing the schemata and the *vota* submitted by the Consultors, he “would add or remove things that seemed to him should be added or removed, developing thus a more mature schema so that, when typeset, it could be immediately reviewed by the Consultors in their residences and jointly discussed the following week. And thus things went until the Consultors reached agreement among themselves as to how the canon should read. For this reason, nothing is read in the new Code that was not discussed four or five times in the manner outlined above, and sometimes ten or twelve times if difficulties were found.”²⁶

In the end, the proposed Books were sent, at Pius X’s order, to all the Bishops of the world and all Prelates of Regular Orders. Their comments were organized by Gasparri and forwarded to the various groups responsible for amending and producing a final version. As all of this was coming to fruition, war broke out in Europe.

3.5 — The Promulgation

Pius X did not live to see the completion of his work, as he died on 20 August 1914, twenty-three days after the outbreak of World War I. Benedict XV quickly reaffirmed the importance of completing the work and on 4 December 1916, “was able to announce to the Cardinals assembled in secret consistory that the Code was ready.”²⁷ On Pentecost, 27 May 1917, in the Constitution *Providentissima Mater Ecclesia*, Benedict promulgated the Code of Canon Law, with the *vacatio legis* lasting until the following Pentecost, 18 May 1918.²⁸

A uniqueness of this codification was its abrogation in canon 6 of all other extant universal canonical legislation, the most radical revision and

congregations, members and faculties of Catholic universities were invited to give their views and express their desires.” AUGUSTINE, *Commentary*, i-ii.

²⁶ GASPARRI, *Preface*, in PETERS (ed.), *1917 Pio-Benedictine Code*, 17-18. As Charles Augustine wrote in his *Commentary* in 1918: “Cardinal Pietro Gasparri remained at work, sacrificing his time and even his health, in the promotion of an almost superhuman task.” AUGUSTINE, *Commentary*, i.

²⁷ AUGUSTINE, *Commentary*, ii.

²⁸ Some canons went into effect earlier, on 19 August 1917: Paschal time, solemn blessing of nuptials at prohibited times; feast days of obligation; fasting and abstinence; privileges of Cardinals. AAS, 9, pars II (1917). In AAS, 31 December 1917, were published *errata* to be corrected as well as the M.P. *Cum iuris canonici* of 15 December 1917 and an index of the new Code.

systematization of canon law in the Church's history.²⁹ Its canons contained none of the narratives of earlier documents. Instead, they offered an abstract and distilled version of the Church's juridic system—in a way, a book of juridic principles with few details.³⁰

²⁹ CIC/17 c. 6 §1 states: "All laws, both universal and particular, which are opposed to the laws prescribed in the Code, are abrogated, with the exception of those particular laws for which express provision is made." And 6° of the same canon states that other disciplinary laws, in effect up to this Code and yet not contained explicitly or implicitly in this Code lose all force unless they appear in liturgical books or are in fact of divine law, positive or natural. One of the first commentaries on the new Code, issued 3 July 1918, underscores this historic point: "The purpose of the new *Codex* is, to supersede all existing collections of papal laws, whether contained in the various official compilations published with the special approval of former Popes, or in the volumes of decrees and declarations published by the various roman Congregations, or, finally, in the many existing private collections of papal laws. Only in those instances in which the new Code expressly declares that a former law on a specified subject is to be retained, are former laws to continue in force." S. WOYWOD, *The New Canon Law: A Commentary and Summary of the New Code of Canon Law*, New York, Joseph F. Wagner, 1918, vi.

³⁰ Cicognani, in detailing the history of the sources of canon law, outlines the causes that led to its making: the very same causes that moved Gratian, Gregory IX, Boniface VIII and many others who sought to clarify and systematize canon law over the centuries.

1. The vast number of laws. What Livy said of Roman Law: "an immense mass of laws heaped upon laws." The French at Vatican I remarked: We are overwhelmed with laws, since canonical legislation, to use the fine expression of Eunapius, 'has become a crushing load even for camels'. One was required to consult at least twelve different sources, including Gratian: Recitation of these is given on page 414.
2. The lack of arrangement of laws. Often they were not arranged systematically. rather sometimes chronology was used (*Bullaria* and Acts of Councils).
3. Many documents were of no use: repetitions or not laws at all.
4. Some laws were mutually contradictory. Correction of law was considered "an odious matter." Thus apparently contradictory laws were left in place until definitively proven to be outdated.
5. Many laws on the books had been abrogated or fallen into desuetude or became particular (e.g., right of canons to elect the bishop was practiced in only a few dioceses of Germany and Switzerland).
6. With so many laws, one could easily be ignorant of the existence of a relevant law or doubtful about its meaning or just unable to find it. Cardinal Gasparri: "It must be confessed that this ignorance or neglect of canon law was due in no small measure to the condition in which that science found itself."
7. Certain laws were confused, harmful and difficult in practice: the form prescribed for solemn judgments, the method of handling disciplinary and criminal causes of clerics, consanguinity and affinity sometimes required pastors to interview 20 or 30 persons to clarify the genealogical tree. Fast and abstinence were outdated.
8. In some cases canon law was silent.
9. The form of the law was often diffuse, wordy and complicated: narratives, expositions, motives and formulae.
10. Many laws were really not universal laws at all, but simply answers to particular cases from which one was drawing general rules (e.g., rescripts of Congregations). CICOGNANI, *Canon Law*, 414-416.

The canons were divided into five principal books, all of which are categories of the science of law in general, both canonical and civil: General Norms,³¹ Persons, Things, Processes, Delicts and Penalties. The Code's critical apparatus, showing the historical basis for the canons, now only the laws' "sources," contained over 25,000 citations.³²

In his Preface to the Code, Gasparri offered his analysis of the need for codification: Despite the efforts of Innocent III, Honorius III, Gregory IX, Boniface VIII and John XXII to synthesize the prior laws, time weakened their accomplishment. Some laws were contradictory; some were just individual cases; sometimes canon law had to be supplemented by civil law; many obsolete laws were still "on the books." In short, it had become Livy's description of Roman law: "an immense accumulation of laws on top of laws".³³

Many bishops responded to inquiries about canon law beginning in 1865 in preparation for Vatican I and the call to reform canon law continued in the Council itself and afterwards.³⁴ An appropriate example is the statement of the provincial bishops of Quebec and Halifax: "Let it be proposed that the whole of ecclesiastical law, under the care of the Supreme Pontiff, now that the Vatican Council is completed, be worked into a Codification with the addition of those enactments on subjects that seem more useful and

³¹ The first book of the Code, General Norms, is an innovation that differentiates the Code from the civil Napoleonic Codes. A book of pre-notions had been prepared by the compilers of the Code Napoleon but it was never published. *Ibid.*, 427.

³² 1,200 from Ecumenical Councils; 4,000 from Apostolic Constitutions; 11,200 from Congregations; 800 from liturgical books.

³³ 1. Various orders of time were contained in the collections.

2. Several documents lacked usefulness and were even an obstacle to the study of canon law, repeating other documents or containing no relevant statute.

3. Some documents were just responses to individual cases, not easily extrapolated into a general rule.

4. Canon law was silent about some matters, requiring canonists to resort to Roman law (e.g., the amount of time for custom to create a law) or to jurisprudence, custom, or the *doctores* (e.g., definition of a quasi-domicile).

5. Many contrary or abrogated laws remained on the books (e.g., the law to select bishops from the chapter of canons, or laws modified by concordats).

6. In short, canon law was like Livy's description of Roman law: "an immense accumulation of laws on top of laws" (I. III, c. 34). GASPARRI, *Preface*, in PETERS (ed.), 1917 *Pio-Benedictine Code*, 8-9.

³⁴ The following are a few examples of the need for reform: (1) Lateran IV's contraction of consanguinity to the fourth degree collateral had to be reduced further to the third degree. (2) The law on canonical form in Trent's *Tametsi* should be modified. (3) The laws on fast and abstinence were in need of revision. GASPARRI, *Preface*, in PETERS (ed.), 1917 *Pio-Benedictine Code*, 10.

applicable. Our reasons are as follows: (1) knowledge of the law that now consists of innumerable constitutions and canons will emerge more easily and widely; (2) many of these have already fallen into desuetude or have been rendered impossible or can be changed to the great benefit of the Church.”³⁵

Interestingly, Gasparri attests that many such proposals were encouraged by the Napoleonic Code movement: “...many Bishops and other Purpled Fathers asked the Apostolic See that [it act] in order to reform canon law and bring it into a more useful order, following the recent example of all the nations, [noting that] they did not doubt that the example of Gregory IX and [the Emperor] Justinian could be followed.”³⁶

In the Introduction to his 2001 translation of the 1917 Code, Edward Peters summed up the uniqueness of the first codification of canon law: “The 1917 Code, which took ecclesiastical discipline from the unwieldy realm of disparate collections and placed it within the sure confines of a single code was the greatest revolution in canon law since the time of Gratian..... The presence of the 1983 Code shows that the first steps that the Church took toward bringing its legal system under control were worth following up on, and there remains very much to be learned from that initial attempt.”³⁷

3.6 — Post-Promulgation

When Benedict XV promulgated the Code, he established a Commission for the Interpretation of the Code of Canon Law (*Cum iuris canonici*), with

³⁵ Ibid., 12. Other examples given by Gasparri:

Bishops of France: “We are weighed down by law.”

Bishops of Germany: Make a new collection of only those laws that are still in force and eliminate all abrogated laws.

Bishops of Belgium: Put ecclesiastical law into a new Code accommodated to the practice of today, with titles, chapters and so on.

Central Italy Bishops: study of canon law is “cluttered...as a result of the jumble of laws that presently obtains,” so reorganize the CIC.

33 Bishops from various parts of the world signed a proposal to Pius IX asking for a new codification of canon law. Ibid., 10-12.

³⁶ Ibid., 13.

³⁷ E.N. PETERS (ed.), *The 1917 Pio-Benedictine Code of Canon Law: In English Translation with Extensive Scholarly Apparatus*, San Francisco, Ignatius Press, 2001, xxx. Among many benefits of this new translation is the inclusion of Gasparri’s Preface to the 1917 Code, Benedict XV’s Apostolic Constitution *Providentissima Mater Ecclesia* (27 May 1917) and his motu proprio *Cum Iuris Canonici* (15 September 1917). Ibid., 1-26.

the aim of preserving the clarity and exclusivity that this unique process had achieved.³⁸ One of the Commission's first decisions (9 December 1917) was to accept questions and *dubia* solely from ordinaries and major superiors of orders and religious congregations, not directly from private individuals. In addition, official translations of the Code were forbidden, insofar as any translation would in many cases bring with it an interpretation of legal meaning.

Benedict, with almost an audible papal sigh of resignation that his voice would not be powerful enough, urged the Roman Congregations to refrain from issuing "general decrees" and to limit themselves to "instructions." Instead of general decrees, there would be a special *consilium* that would officially incorporate any needed derogations. The intent clearly was to build on the success of the Code, turning it into an ever-new, current "law book" of the Catholic Church.³⁹ In fact, only a few canons were so modified over the next half century.

Of course, history will not be denied. Benedict's fear came about with the swiftness of inevitability. As Woywod wisely predicted less than two months after the Code's *vacatio legis* ended, "Let no one, however, labor under the impression that the Code means the legislation of the Supreme Head of the Catholic Church has now come to an end. An organization like the Catholic Church, living and laboring in the great, wide world, and guiding millions of people of all races in the way of truth, must needs adapt her work to the ever-changing conditions of peoples and times. The present Code, therefore, is not, and cannot be, the final law in all and everything."⁴⁰

³⁸ One must keep in mind the fact that, despite its "exclusivity," the Code was not the only law of the Catholic Church. Other laws remained in force: the law of the Eastern Rites; liturgical law; concordats; custom; particular laws; acquired rights; apostolic privileges and indults.

³⁹ "The Holy Father has, however, provided (*motu proprio*, 15 September 1917, in AAS, 9 [1917], 483) that any and all new laws, as well as the possible repeal of some canons of the new Code, also any interpretative declarations, etc., issued either by the Supreme Pontiff himself or by one of the Sacred Congregations, shall be turned over to a committee whose duty it will be to formulate the new laws, etc., into canons, and to insert them in the Code in their proper places, so that the Code may for all times remain the one, authoritative and complete lawbook of the Church." Woywod, *The New Canon Law*, vi-vii.

⁴⁰ He added that "new amendments, decisions, declarations concerning the meaning of some of the laws, and exceptions and particular regulations to fit the exceptional conditions of particular countries or dioceses, must naturally be expected" Ibid., vi. The promulgation was called "the greatest ecclesiastical event of the twentieth century." A papal medal was struck to commemorate it. Vellum was put in Benedict XV's coffin which included the following inscription: "For the purpose of arranging the law of the Church in a way suitable to the times, Benedict promulgated the Code of Canon Law, composed by order of Pius X." CICOGNANI, *Canon Law*, 423.

Even with a spare and exclusive Code of laws, the Church's legal system invariably grew complicated and unwieldy. In "clarifying" the law, instructions and interpretations, often, for all practical purposes, ended up changing it. Authoritative interpretations quickly amounted to a volume larger than the Code itself. The proposed *consilium* to keep the Code updated did not function, even though new legislation was needed. The classic example for canonists took place only eighteen years after the Code went into effect: *Provida mater Ecclesia*, issued by the Congregation for the Sacraments on matrimonial nullity procedures.

Of course, the situation was nothing like the massive challenges of the past, but the canons still needed to be updated if the codification system was to be effective. Moreover, perhaps unforeseen in 1917, the world and the Church were undergoing radical changes no less significant than the nineteenth century revolutions. The "war to end all wars" did not end all wars; it was soon followed by the Second World War. At the same time, the Church was experiencing a pressing need for theological and pastoral renewal. True to its history, such renewal would require not only a Council, but the reform of canon law.

4 — *The 1983 Code*

4.1 — Vatican II

John XXIII opened the windows of the Church to much needed renewal and reform. On 25 January 1959, at St. Paul's Outside the Walls, he announced three tasks: to convoke a second council of the Vatican, to convoke a synod for the Diocese of Rome, and to establish a commission to revise the Code of Canon Law.

Surprisingly, the close connection of renewal and legal reform in the Church's history was not initially appreciated by all regarding the proposed revision.⁴¹

⁴¹ The connection of Church renewal with reform of the law is not something new. James Coriden has highlighted the following seven reform movements as significant for the history of canon law (J.A. CORIDEN, *An Introduction to Canon Law*, Mahwah, NJ, Paulist Press, 2004, 30).

- Gelasian reform (5th century) – canonical collections, including that of Dionysius Exiguus
- Carolingian reform (8th century) – canonical collections, including the *Dacheriana*
- Gregorian reform (11th century) – canonical collections, including the *Dictatus Papae*, and leading the next century to Gratian's *Decretum*
- Conciliar solution (15th century) – ecumenical council canons responding to the Great Western Schism
- Tridentine reform (16th century) – conciliar decrees

Some looked upon the conciliar convocation as simply a completion of the unfinished business of Vatican I (which was only officially adjourned by John XXIII in 1960). The original schemata presented in the first session of Vatican II were an example of that kind of continuation. The same thinking also affected legal reform, insofar as some viewed it as a scientific project that could be accomplished on its own without any real reliance on the outcome of the Council.

Things did not turn out that way. The Council fathers tossed out the left-over Vatican I schemata. It became clear that no revision of canon law could occur until all Council documents had been finalized and thoroughly analyzed. In fact, Vatican II, probably more than any other ecumenical council, required a great deal of new law and revision of old law for its implementation. Sometimes, the Council Fathers, without realizing it, were in fact drafting canon law. As one simple example, one can compare the wording of Canon 1055 §1 and its source, *Gaudium et spes* n. 48.

4.2 — The Code Commission

John XXIII and Paul VI understood this. John XXIII delayed for four years the appointment of the initial membership of the Commission for the Revision of the Code of Canon Law, naming the members on 28 March 1963. With his death two months later and the radical new direction taken in the second session of the Council under Paul VI, the Commission itself, wisely suspended its activity until the Council's completion. Some seventy consultors were appointed in 1964, but the work of the Commission was not formally inaugurated until 20 November 1965, a few days before the Council's adjournment.

4.3 — The Revision Process

At that inaugural session of the Commission, Paul VI insisted on “a new way of thinking proper to the Second Ecumenical Council of the Vatican, in which pastoral care and the new needs of the people of God are met.”⁴² It became clear that this particular reform of canon law was not merely a new collection like the early days nor a new systematization like that of Gratian. It was more akin to the radical change in canon law brought about by the 1917 Code and yet something that would go far beyond that first

- Conservative reform (20th century) – 1917 Code of Canon Law
- Pastoral reform (20th century) – 1983 Code of Canon Law

⁴² *Communications*, 1 (1969), 41.

Code. It would not simply be a reformulation and refinement of canonical principles, but a complete redrafting of norms to make effective the reform of ecclesial structures and activity sought by the Council. The redrafting that was almost an unheard-of innovation of the 1917 Code became the standard *modus operandi* of its revision.

This approach was so significant that, unlike the legal strategy of interpreting new laws in the way that they harmoniously alter previous laws, the interpretation of the revised Code would often rely on the meaning of the documents of Vatican II. Accordingly, in formally presenting the revised Code on 3 February 1983, John Paul II explicitly called for an “exegetical and critical comparison of the conciliar texts and their respective canons.” The ecclesiologist, Joseph Komonchak has put it nicely: “But surely it is the Council that must interpret the Code, and not the Code the Council.”⁴³

By 1966, the group of consultors was expanded and conferences of bishops throughout the world were asked to submit suggestions. At that time, Cardinal Pericle Felici assumed the presidency of the Commission, remaining in that position for sixteen years. Members of the Canadian Canon Law Society participated most faithfully in what were initially ten small working groups on various sections of the Code. Schemata were developed, commented on by many groups throughout the world, revised and re-revised over a fourteen-year period. Unlike the consultation prior to the 1917 Code, which tended to be more in the hands of Cardinal Gasparri and experts resident in Rome, this consultation was broadly international, though still coordinated by Rome.

There is no question that there were tensions and many of us understandably felt that Cardinal Felici and his staff were controlling the process too strictly. Yet, it was quite an enterprise. It actually had the aura of the Vatican Council itself, which was so fresh in everyone’s mind.

4.4 — Post-conciliar Legislation

An interesting part of the development in the period between the close of the Council in 1965 and the promulgation of the Code in 1983 was the introduction of several pieces of post-conciliar legislation, quickly implementing conciliar reforms. A few that come to mind: *De episcoporum muneribus* (the dispensing power of the diocesan bishop); *Renovationis causam* (entrance into religious life); *Matrimonia mixta* (regulations on ecumenical marriages);

⁴³ J. KOMONCHAK, “A New Law for the People of God: a Theological Evaluation,” in *CLSA Proceedings*, 42 (1980), 42.

Causas matrimoniales (tribunal procedures for marriage cases). Unlike post-conciliar periods in the past (e.g., Pius X's legislation after Vatican I), these laws were consciously intended as interim documents that would be, and in fact were, amended and folded into the revised Code.⁴⁴

4.5 — The Principles of Revision

An even more significant element of the revision process was the issuance of the principles of revision. In April 1967, a central committee of consultors developed ten fundamental principles which, in their expert opinion, captured the thrust of Vatican II and its specific directions to guide the process of the revision of the law. These principles became the agenda of the Synod of Bishops, which, after a five-day discussion, modified them and approved them in October of that year. Throughout the revision process, these principles guided the task of translating the pastoral decisions of the Council into the juridic content of the canons. These principles are helpful even today in understanding the theory underlying certain legal norms, relating the canons to the conciliar decrees, and interpreting and applying the norms properly to today's pastoral situations.⁴⁵

4.6 — Consultation

While the Secretariat of the Commission coordinated the process, a great deal of it took place piecemeal. The initial schemata were evaluated by all conferences of bishops, the Union of Superiors General, agencies of the Roman Curia, pontifical universities and faculties worldwide. These groups in turn consulted with canon lawyers, theologians, and pastoral leaders to provide critiques and suggested amendments. As was happening with our sister societies, many of us in the Canon Law Society of America were quite busy participating in an ongoing Task Force on the Revision of the Code.

Schemata were issued year by year: administrative tribunals in 1972 (which did not see the light of day); penalties in 1973; sacraments in 1975;

⁴⁴ Pius X issued several important documents between Vatican I and the promulgation of the 1917 Code: *Ne temere* on marriage form in 1907; *Sapienti consilio* on the Curia in 1908; *A remotissima* on *ad limina* visits and reports in 1909; and *Maxima cura* on administrative removal of pastors. However, the post-conciliar legislation promulgated by Paul VI after Vatican II was more harmoniously and overtly crafted as interim legislation until a complete redrafting of canon law could take place in the revised Code.

⁴⁵ See J. ALESANDRO, "General Introduction," in J. CORIDEN et al. (eds.), *The Code of Canon Law: A Text and Commentary*, NY/Mahwah, NJ, Paulist Press, 1985, 5-7.

all the remaining drafts in 1977.⁴⁶ All official reviews were completed by the end of 1978. The results were submitted to small working groups of consultants to revise the initial drafts. From this coordinated effort emerged a single volume draft Code on 29 June 1980.

Later that year, a proposal arose at an assembly of the Synod of Bishops that the Holy Father implement a second round of consultation with the conferences of bishops. Cardinal Felici, the Secretariat staff and other individuals forcefully resisted this suggestion. John Paul II compromised by adding to the Commission fifteen new members representing conferences of bishops around the world, raising the total membership to seventy-four. In 1981, the members of the Commission were asked to submit to the Secretariat written *vota* about individual canons, which were carefully summarized by the staff into the *Relatio* dated 16 July 1981. The final *plenaria* of the Commission, scheduled for October of that year, would consider the 1980 draft Code and the *Relatio*. The *Relatio* included thirty-eight new canons on rights taken from the *Fundamental Law of the Church* which, in May 1981, had been submitted by its own Commission for promulgation as a separate document. John Paul II had quickly decided that there would be no self-standing *Fundamental Law*. Instead, the key canons on ecclesial rights were transferred to Book II of the Code.

4.7 — The Final *Plenaria*

The final *plenaria* of the Code Commission took place in Rome, 20-28 October 1981. Several *periti* were present to advise their country's members. The members and *periti* of Canada, the United States, Great Britain, Ireland, and Australia met regularly to strategize, under the leadership of Cardinal Hume and the other members.

The Secretariat submitted six *ex officio* agenda items for discussion: lay exercise of ecclesiastical jurisdiction (c. 129 §2); review of an affirmative sentence of marriage nullity (c. 1682); hierarchical confirmation of the dismissal of a religious (c. 700); remarriage of widowed permanent deacons (c. 1087); freemasonry and *latae sententiae* excommunication (c. 1374); and administrative tribunals (cc. 1732-1739).⁴⁷

⁴⁶ Procedural law, religious, general norms, the people of God, the teaching office, sacred times and places and divine worship, temporalities.

⁴⁷ These canon numbers refer to the 1983 Code as promulgated. The canons for administrative tribunals, although recommended by the Commission, were not included by John Paul II in the promulgated version. Canons 1732-1739 deal solely with hierarchical recourse against administrative decrees.

The members themselves placed thirty-five more items on the agenda, with each such item requiring the signatures of ten members. Not every proposal made the agenda. For example, Archbishop Joseph Bernardin was unsuccessful in this attempt to solicit ten signatures to place on the agenda his proposal to delete the word *vir* from the canon on the installation of lectors and acolytes, so that these lay ministries would be open to both women and men. The limitation to men remained for formal installation, and the inclusion of women was left to the paragraph on “temporary deputation” (c. 230 §2).

At the conclusion of the *plenaria* on 29 October 1981, the members unanimously presented the amended version of the Code to John Paul II. For more than a year, the Holy Father studied the proposed Code with the assistance of a small group of canonists. Upon Cardinal Felici’s sudden death on 22 March 1982, Archbishop Rosalio Castillo Lara, who had been Secretary of the Commission for several years, was named Pro-President. Changes in the final draft were made by John Paul II, prior to promulgating the Code on 25 January 1983, twenty-four years to the day after John XXIII’s announcement of the project. A ten-month *vacatio legis* ended on the first Sunday of Advent, 27 November 27 1983.

4.8 — The New Ecclesiology

Paul VI’s “new way of thinking” was not simply a catch phrase for the revised Code. It signaled a fundamental shift in ecclesiology, reflecting the change in approach from Vatican I to Vatican II, from the first Code to the second. The 1917 Code was more “juridical” in its style and content, insofar as the “perfect society” ecclesiology underlying the canons fostered a code that would be similar *pari passu* to the surrounding civil codes of Europe. Certainly, its fundamental meaning and purpose were unique: as the last canon of both codes notes, “the salvation of souls.” The “perfect society” approach of the first code, however, morphed into a new view of the Church as the unique People of God, whose law must also be unique, perhaps quite different in structure and content from civil law—still a “code” but no longer an ecclesial mirror or counterpart of the Napoleonic codes.

Paul VI could not have been more explicit in his remarks to the Rota on 4 February 1977: “The revision of the new Code of Canon Law cannot consist solely in the correction of the former one, by arranging the contents in proper order, by adding what it seems appropriate to add, and omitting whatever no longer applies. Rather, after the celebration of the Second

Vatican Council, the new Code must prove to be an instrument most finely adapted to the life of the Church.”⁴⁸

John Paul II highlighted the *novitas* of the revised code as a canonical translation of Vatican II’s ecclesiology, listing points such as the following: the Church as the people of God; the role of service that must epitomize the hierarchy; the Church as *communio*; the essential relationship of the particular churches and the universal church, of collegiality and primacy; the fundamental sharing by all members of the Church, lay and clergy, in the three-fold office of Christ as priest, prophet and king.⁴⁹

Notice the subtle reference to the loss of the Papal States and the first Code of Canon Law in his remarks at the official presentation of the Code: “Law is not conceived as a foreign body, nor as a now useless superstructure, nor as a residue of presumed temporal claims.”⁵⁰ One would never have heard such words from Cardinal Gasparri or Pius X!

This ecclesiology is why the very structure of the revised Code was changed from the five traditional categories that pre-existed and systematized the 1917 Code and could have been used for any *societas perfecta*. In the 1983 Code, the priest-prophet-king motif was used to highlight the uniqueness of the Church, particularly the Pauline notion of Christian equality (evidenced by the Fundamental Law canons in Book II) and the call to service based on sacramental commissioning.

4.9 — Ecclesial Sacramentality

One of the most fundamental shifts in the revised Code is its emphasis on sacramentality as the basis of hierarchical communion. Baptism and confirmation, not juridical delegation, commissions Christians to carry out the works of the Lord. Clerics are not merely delegated lay persons; they are sacramentally ordained to their role of service. This sort of shift is not simply theoretical. It appears in a different approach to rights and responsibilities.

⁴⁸ Latin text located at www.vatican.va/content/paul-vi/la/speeches/1977/february/documents/hf_p-vi_spe_19770204_sacra-romana-rota.html.

⁴⁹ “Indeed, in a certain sense this new Code could be understood as a great effort to translate this same conciliar doctrine and ecclesiology into *canonical* language. If, however, it is impossible to translate perfectly into *canonical* language the conciliar image of the Church, nevertheless the Code must always be referred to this image as the primary pattern whose outline the code ought to express insofar as it can by its very nature.” John Paul II, Apostolic Constitution *Sacrae disciplinae leges*, 25 January 1983, English translation in *Code of Canon law: Latin-English Edition*, Washington, D.C., Canon Law Society of America, 1989, xxx.

⁵⁰ *Communicationes*, 15 (1983), 14.

A good example can be seen in the Code's heightened role of the diocesan bishop as a sacramental calling. He is not a quasi-delegate of the Holy See but the sacramental head of his particular church "in which the one, holy, catholic and apostolic Church of Christ is truly present and operative" (c. 369). Thus, like the Pope for the universal Church, the diocesan bishop's power is "ordinary, proper and immediate" (c. 381). It is presumed to exist and its exercise is restricted only when explicitly stated, a juridical implementation of *Lumen gentium* 27. This sacramental view calls the diocesan bishop to service of his people and of the whole Church not merely by external acts but by his personal life.

5 — *Two Codes and Today*

This is not to say, however, that the revised Code is not dependent on the 1917 Code and earlier legislation nor that the inclusion of canons from the 1917 Code is always smooth and homogenous. At times, the revision process did not manage to harmonize the prior law with the extant version. It settled simply for the juxtaposition of the two. One example is the description of marriage in canon 1055. Paragraph 1 synthesizes the Council's teaching on marriage, rejecting the categorization of the ends of marriage as hierarchical (a significant innovation of the 1917 Code) and, faithful to *Gaudium et spes*, referring to marital consent as a "covenant." Yet, after such a carefully phrased paragraph, the second paragraph of the canon repeats verbatim canon 1012 §2 of the 1917 Code, reverting to the use of "contract" and identifying as a sacramental marriage any valid union of two persons who are both baptized, even if unknowingly.

Thirty-four years have elapsed since the revised Code's promulgation. During that time, it is clear that, like previous centuries, the law has not stood still. A case in point is represented by the many changes that have occurred regarding canon 1395 §2, starting with the promulgation of *Sacramentorum sanctitatis tutela* (SST) in 2001.

5.1 — Sexual Abuse Norms

5.1.1 — 2001: *Sacramentorum sanctitatis tutela* (SST) and the CDF Letter

On 30 April 2001, Pope John Paul II issued the Apostolic Letter *motu proprio Sacramentorum sanctitatis tutela* (SST), which was followed by substantive and procedural norms of the Congregation for the Doctrine of the

Faith (CDF) when dealing with “more serious delicts” (*graviora delicta*). One might suggest that SST and the CDF norms did not merely *specify* but actually considerably *extended* the “exclusivity” of the CDF’s competence in these cases.⁵¹ The *motu proprio* and norms made many of the particular law derogations that had been granted seven years earlier to the dioceses in the United States universal law, applicable throughout the world.⁵² Without actually citing canon 1395 §2, the norms effectively derogated from the canon by extending the element of age from “below sixteen” to “below eighteen.”⁵³

⁵¹ JOHN PAUL II, Apostolic Letter *motu proprio Sacramentorum sanctitatis tutela*, 30 April 2001, in AAS, 93 (2001), 737-739. English translation at www.vatican.va/holy_father/john_paul_ii/motu_proprio/documents/hf_jp-ii_motu-proprio_20020110_sacramentorum-sanctitatis-tutela_it.html. The Latin text and an English translation of *Sacramentorum sanctitatis tutela* (SST) and the CDF norms can be found in W. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, 2nd ed., Ottawa, St. Paul University, 2003, 300-309.

⁵² These documents specified in much greater detail the task of the CDF stated in *Pastor bonus* to oversee proactively cases in which clerics were accused of sexual abuse of a minor; they explicitly identified such acts as *graviora delicta* for which the Congregation possessed *exclusive* competence. *Pastor bonus*, art. 52, promulgated on 28 June 1988, reads as follows: “The [Congregation for the Doctrine of the Faith] examines delicts against the faith and more grave delicts whether against morals or committed in the celebration of the sacraments, *which have been referred to it* and, whenever necessary, proceeds to declare or impose canonical sanctions according to the norm of both common and proper law” [*italics added*]. SST notes that *Pastor bonus* left open the question of what acts qualify as “the more grave delicts whether against morals or committed in the celebration of the sacraments,” thus requiring SST to “define more precisely” the delicts in question “for which the competence of the Congregation for the Doctrine of the Faith remains exclusive, and also the special procedural norms ‘for declaring or imposing canonical sanctions.’” At the very least, if not extending the CDF’s competence, SST served as the means by which the Holy Father “referred to” the CDF these particular “delicts . . . against morals” as falling within the competence outlined by *Pastor bonus*, art. 52 lest there be any doubt about the proper process to be followed. JOHN PAUL II, Apostolic Constitution on the Roman Curia *Pastor bonus*, 28 June 1988. Official English translation at www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_19880628_pastor-bonus_en.html. Reprinted with permission in *Code of Canon Law: Latin-English Edition*, Washington, D.C., CLSA, 2012, 679-751.

⁵³ The individual norms promulgated by SST clarified various substantive and procedural points.

- Art. 4, §1 reserved the adjudication of such cases to the CDF and increased the age of a “minor” to “below eighteen.” AAS, 93 (2001), 785-788; WOESTMAN, *Ecclesiastical Sanctions*, 304-305. Art. 4, §1 clearly applies equally to all minors, including pubescent females, unlike the *crimen pessimum* of *Crimen sollicitationis*. However, the CDF norm, in stating this element of the delict, does not cite canon 1395 §2 nor advert to its own norm as a derogation of the universal law, even though in the previous article on delicts against the sanctity of the sacrament of penance (art. 3, 1^o-3^o) it does specifically cite the relevant canons of both the Code of Canon Law and the Code of Canons of the Eastern Churches

A few weeks later, on 18 May 2001, the CDF sent a letter to bishops and other ordinaries and hierarchs about how they were to address *graviora delicta* and their interaction with the CDF. The letter stated exactly what “exclusivity” would mean in such situations and the process to be followed.⁵⁴

5.1.2 — 2002: *The USCCB Charter and Essential Norms*

A year after the promulgation of SST and the CDF norms on *graviora delicta*, the bishops in the United States revised and approved at their general meeting of 11-14 November 2002 the *Charter for the Protection of Children and Young People* and the *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons*. Upon receiving the *recognitio* of the Apostolic See a month later, the *Essential Norms* became particular law for the United States.⁵⁵

5.1.3 — 2003: *The Expansion of SST and the CDF Faculties*

Two months later, in a personal audience granted to Cardinal Ratzinger on 7 February, 2003, Pope John Paul II expanded SST and the CDF faculties of 2001, both substantively and procedurally, for the entire world, permitting

that set forth the elements of individual delicts: absolution of an accomplice (c. 1378 §1; CCEO 1457); solicitation (c. 1387; CCEO 1458); violation of the sacramental seal (c. 1388; CCEO 1456 §1). *Ibid.*, 304.

- Art. 4, §2 mentioned both dismissal and deposition as the most serious of expiatory penalties in order to apply to both the both the Latin Code and the Eastern Code insofar as the latter uses the term “deposition” in canons 1433 §2 and 1453 §1.
- Art. 5, §1 made it clear that all reserved cases, including clerical sexual abuse of a minor, run for ten years from the commission of the delict. In addition, §2 of the same article provided a tolling of the running time for abuse of a minor until the minor turned eighteen, no matter when the delict was committed.
- Art. 17. “The more grave delicts reserved to the Congregation for the Doctrine of the Faith could be tried only in a judicial process.”

⁵⁴ “As often as an ordinary or hierarch has at least probable knowledge of a reserved delict, after he has carried out the preliminary investigation, he is to indicate it to the Congregation for the Doctrine of the Faith which, unless it calls the case to itself because of special circumstances of things, after transmitting appropriate norms, orders the ordinary or hierarch to proceed ahead through his own tribunal. Appeal against a sentence in first instance is solely to the CDF.” WOESTMAN, *Ecclesiastical Sanctions*, 304.

⁵⁵ The request for *recognitio*, signed by Bishop Wilton Gregory on 15 November 2002, received an immediate approval from Cardinal Giovanni Battista Re on 8 December 2002. *Ibid.*, 355. It should be noted that the *Charter* states the context and rationale for the *Norms*; only the *Essential Norms*, however, upon *recognitio* by the Apostolic See, became particular law for the USCCB region.

the CDF to derogate from prescription⁵⁶ and to permit cases to be handled administratively.⁵⁷

5.1.4 — 2009: *Special Faculties for the Congregation for the Clergy*

On 30 January 2009, Pope Benedict XVI granted special faculties to the Congregation for the Clergy to resolve grave violations of celibacy or situations where clerics had freely and illicitly abandoned ministry for an extended period.⁵⁸ More than a year later, the Congregation for the Clergy issued procedural guidelines to be followed when bishops seek the Congregation's exercise of such special faculties to remove priests from the clerical state.⁵⁹

⁵⁶ A major change was the faculty for the CDF to derogate from the period of prescription stated in SST (ten years) "on a case by case basis after having considered the request of the Bishop and the reasons for such request." *Pars Prima: Normae Substantiales, Facoltà di derogare della prescrizione*, in WOESTMAN, *Ecclesiastical Sanctions*, 314.

⁵⁷ Less than two years after the Holy See had reaffirmed the requirement of the judicial process in all cases, the CDF was granted the faculty to permit certain cases to be dealt with extra-judicially. Moreover, the expansion of faculties reinstated in a certain sense "involuntary laicization" (which had been in the 1917 Code) by authorizing the CDF to refer cases to the Roman Pontiff for *ex officio* dismissal or even to permit the local Ordinary to decide individual cases by non-judicial penal process and submit the matter to the CDF, which was now itself authorized to issue an administrative (extra-judicial) decree of dismissal: "The faculty is granted to the CDF to dispense from art. 17 in those grave and clear cases which, according to the Particular Congress of the CDF: a) may be referred directly to the Holy Father for an *ex officio* dismissal from the clerical state, or b) may be treated under the summary process of can. 1720 by the Ordinary who, in case he is of the opinion that the accused should be dismissed from the clerical state, will ask the CDF to impose dismissal by decree." *Pars Altera, Normae Processuales, Facultas dispensandi*, WOESTMAN, *Ecclesiastical Sanctions*, 315.

⁵⁸ The first of these faculties provided a process of seeking the Roman Pontiff's approval *in forma specifica* of the imposition of dismissal and dispensation from all obligations of the clerical state, including celibacy, as a penalty for violations of canons 1394 §1 (attempting marriage) and 1395 (grave sins against the sixth commandment). Nonetheless, the faculty did not derogate from SST and the 2001 CDF norms and did not therefore provide another avenue of dealing with the *delictum gravius* of clerical sexual abuse of minors: all such matters were to remain within the jurisdiction of the CDF. This was made very clear no less than two months after the issuance of the procedural guidelines of the Congregation for the Clergy. These faculties were described in a Circular Letter from the Congregation of 18 April 2009 (Prot. N. 2009/0556). See S. EUART and S. VERBEEK (eds.), *Roman Replies and CLSA Advisory Opinions 2009*, Washington, D.C., CLSA, 2009, 37. For a detailed analysis of the Special Faculties, see Kevin Gillespie, "The Special Faculties Granted to the Congregation for the Clergy for the Salvation of Souls and the Good Order of the Ecclesiastical Community: Context, Purpose and Use," in *Proceedings of the Annual Convention of the Canon Law Society of Great Britain and Ireland*, (2013), 59-76.

⁵⁹ 17 March 2010 (Prot. N. 2010/0823). See S. EUART, J. ALESSANDRO and P. HARTMANN (eds.), *Roman Replies and CLSA Advisory Opinions 2010*, Washington, D.C., CLSA, 2010, 43.

5.1.5 — 2010: Expansion of the CDF Faculties

With the approval of Pope Benedict XVI on 21 May 2010, the CDF confirmed an expanded version of its own faculties; these, amended the *motu proprio* SST of 2001 and the CDF norms on *delicta graviora*, making it abundantly clear that all cases of clerical sexual abuse of a minor remained exclusively within the competence of the CDF.⁶⁰

5.1.6 — Conclusion

In sum, over the last two decades, with the revised Code “intact,” the Church has significantly changed its substantive and procedural laws regarding the delict of sexual abuse of a minor and removal from the clerical state. The delict itself has been redefined to include victims under eighteen years of age, and the period of prescription has been greatly lengthened, if not for all practical purposes abandoned, insofar as the CDF can derogate it completely. In addition, in regard to the clerical state, the concept of “removal” has been inserted between “dismissal” and the *via gratio*sa.

- ⁶⁰ 1. The period of prescription was extended from ten years (SST Norms, art. 5, §1) to twenty years (art. 7).
2. A developmentally disabled victim over eighteen years of age was to be considered a minor for the purposes of the delict of sexual abuse of a minor (art. 6 §1, 1°).
3. Acquisition, possession or distribution of pornographic images of minors under the age of fourteen was explicitly stated to be a *delictum gravior* (art. 4, §2).
4. The diocesan bishop’s right to remove the priest from active ministry while a preliminary investigation is underway was affirmed (art. 19).
5. Pursuant to the law establishing its expanded role, the CDF continued to exercise significant faculties regarding process:
 - to derogate completely from prescription on a case by case basis (art. 7);
 - to dispense officials from the requirements of priesthood and a doctorate in canon law in such cases (art. 15);
 - to allow dismissal to be imposed by administrative decree if requested by the diocesan bishop or even ex officio, as had been stated in 2003; without such a mandate from the CDF, dismissal can be imposed solely by a judicial trial (art. 21 §2, 1°);
 - to present a case directly to the Holy Father for dismissal (including a dispensation from celibacy) provided that three conditions are met: (1) the case is extremely grave; (2) it is clear that the delict was committed; (3) the accused was guaranteed the right of defense (art. 21, §2, 2°).

See T. GREEN, “*Sacramentorum Sanctitatis Tutela*: Reflections on the Revised May 2010 Norms on More Serious Delicts,” in *The Jurist*, 71 (2011), 120-158; and the brief note appended to the CDF letter of 21 May 2010 in *Origins*, 44 (2010), 146-147.

5.2 — Other “Legislation”

While the alteration of penal law regarding sexual abuse stands out as a major revision of the canons less than twenty years after the Code’s promulgation, there are several other alterations to keep in mind:

- The inevitable eradication in 2009 of the “formal act” as an exemption from the mixed marriage prohibition (c. 1124), the disparity of worship impediment (c. 1086), and the obligation of canonical form (c. 1117). These derogations are similar to the amendment Pius XII made on 1 August 1948 of the wording of canon 1099 of the 1917 Code.
- The changes in regard to deacons in canons 1008-1009 to conform to the Catechism. These changes, distinguishing the diaconate from the orders of presbyter and bishop, may very well affect the outcome of the Papal Commission studying the possibility of ordaining women as deacons, currently prohibited by canon 1024.
- *Mitis Iudex Dominus Iesus* and *Mitis et misericors Iesus* procedural derogations, including a reordering of the canon numbers.
- *De concordia inter Codices* to harmonize the Codes.
- The possibility that the entire penal law will be revised, incorporating changes already made in the law and introducing new ones.

While these significant derogations or additions to the Code have been forthrightly viewed as changing the universal law, also at work since 1983 has been the tried and true practice of effectively revising the Code without overtly changing it. Hundreds of interpretations of the PCLT may verge on changes more than clarifications. The “applications” of the law to specific cases provided by various Roman Congregations also end up as “rules of thumb” which are at least additions to the Code, if not subtle derogations of it. The various “norms” that emanated from SST are a clear example of “creeping derogation.”

5.3 — *Dignitas Connubii*

However, these strategies pale in comparison to the issuance of “Instructions” about highly juridical matters. The paradigm for canon lawyers in the field of marriage is *Dignitas connubii*. Does it really take a second place to the canons, or is it simply additional law? Unlike *Mitis Iudex*, it was issued not as an overt derogation but as an “Instruction,” a device dating back to the first Code and beyond.

Theoretically, Roman Instructions do not make new law. Like *Provida Mater* (15 August 1936), *Dignitas connubii*’s stated intention was to provide “for the

same causes to be instructed and decided more quickly and more securely.” Thus, the Instruction states: “After the Code was promulgated in 1983, there appeared a pressing need to prepare an instruction which, following the footsteps of *Provida Mater*, would be helpful to judges and other ministers of the tribunal in properly understanding and applying the renewed matrimonial law”⁶¹

In providing guidance for the application of the law, *Dignitas connubii* was also to take account of authentic interpretations of PCLT, doctrinal development and the evolution of jurisprudence.⁶² Its clear purpose was to guide judges to avoid “the difficulties which can emerge in the course of a trial even from the manner in which the norms of this process have been distributed throughout the Code.”⁶³ It again underlines its avowedly humble task: “Thus, the procedural laws of the Code of Canon Law for the declaration of the nullity of marriage remain in their full force and reference is always to be made to them in interpreting the Instruction.”⁶⁴ And yet, the final paragraph of the Instruction’s introduction reads: “Therefore, the following norms are to be observed by diocesan and interdiocesan tribunals in handling causes of the nullity of marriage.” Interestingly, the Latin does not use *normae*, only *haec quae sequuntur*; but, with or without the words *normae* or *leges*, there is plenty of obligation packed into the phrase *servanda sunt*!⁶⁵

Article 1 §2 makes it abundantly clear: “All tribunals are regulated by the procedural law of the Code of Canon Law and by this Instruction” In the end, however, this set of “regulations” was issued not by the Pope as legislator but by the PCLT as interpreter and instructor on a carefully chosen date—25 January 2005—the twenty-second anniversary of the promulgation of the Code.⁶⁶

Conclusions

History speaks for itself, but I will offer you a few modest reflections by way of conclusion.

1. Canon law is scientific. To be so, it must be clear and orderly.
2. Canon law is practical. It applies to concrete cases or it is useless. As cases change and emerge, the law must accommodate the change.

⁶¹ PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Instruction *Dignitas connubii*, 25 January 2005, Libreria Editrice Vaticana, 2005, 13.

⁶² *Ibid.*, 15.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, 17.

⁶⁵ *Ibid.*, 18-19.

⁶⁶ *Ibid.*, 223.

3. Jurisprudence is a kind of law. Augustine quotes Schenkl's definition: "the habit (*habitus*) of knowing, interpreting and applying the laws."⁶⁷ When the jurisprudence becomes so universal that it applies in almost every case, we call it a law. Consider the development of canon 1095 of the 1983 Code in the twentieth century: first instance cases began to apply an expanded understanding of psychological incapacity, including non-psychotic personality disorders; Rotal decisions reversed or affirmed such decisions; widespread jurisprudence developed at first and second instances, including expanded decisions by the Rota; the 1983 Code of Canon Law enshrined the principles in canon 1095.
4. Practicality breeds change with developing circumstances and worlds, with new problems and challenges. Change breeds new jurisprudence and new law. New law breeds proliferation and confusion, militating against clarity and applicability, which science cannot abide for long.
5. The 1917 Code did not simply seek to implement Vatican I. It was cleaning up the entire body of ecclesiastical law by embarking on a new format of codification. It encountered its own problems. It could not resist the force of historical events, changing attitudes, new needs, and a developing world and Church, but it did establish a new codified style.
6. On the other hand, the 1983 Code, while retaining the style of codification, truly concentrated on the Council as the standard against which the canons would be measured and as the source of new law. Because of the conciliar ecclesiological perspective, the revised Code is more open to derogation and development in law, whether overtly or impliedly. This may continue piecemeal for a while but, at some point, it will surely be necessary to reorganize the canons and start over again, perhaps with an even more unique style of law.

⁶⁷ AUGUSTINE, *Commentary*, 7.

FORMATION DURING THE PERIOD OF TEMPORARY VOWS ACCORDING TO THE 1983 CODE AND THE SUBSEQUENT HOLY SEE DOCUMENTS

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SUMMARY — The Church recognizes that novitiate formation is insufficient to prepare religious to attain the maturity necessary for permanent commitment. Therefore, the Church directs that, after first profession, formation of religious is to continue and be perfected (cf. c. 659 § 1). Additionally, the Church requires that each institute draw up a *ratio* for post-novitiate formation which specifies its structure and duration in accord with universal norms, while permitting adaptations of aspects that may require revision as a result of new needs and realities. The Church has legislated norms on post-novitiate formation which specify its aims, dimensions and pedagogy (cc. 659-661) and has issued subsequent documents with further directives on the challenges facing formation in the post-conciliar period. Therefore, the updating of the *ratio* is to take into account both the provisions of universal law and the directives found in related post-conciliar documents. The study gives an analysis of the norms on formation during temporary vows as presented in the 1983 Code and the subsequent Holy See documents to expose their deeper meaning in view of offering a resource for religious institutes in need of updating their post-novitiate formation programme.

RÉSUMÉ — L'Église reconnaît que la formation au noviciat est insuffisante pour préparer le religieux à atteindre la maturité nécessaire pour un engagement permanent. L'Église ordonne donc qu'après la première profession, la formation des religieux se continue et se perfectionne (voir c. 659, § 1). De plus, l'Église exige que chaque institut conçoive un *ratio* pour la formation post-noviciat qui spécifiera sa structure et sa durée conformément aux normes universelles, tout en permettant l'adaptation nécessaire pour répondre à des besoins nouveaux ou des réalités différentes. L'Église a promulgué des

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normes sur la formation post-noviciat qui précisent ses buts, ses dimensions et sa pédagogie (cc. 659-661), et a ensuite émis des documents contenant des directives additionnelles sur les défis d'une formation dans la période post-conciliaire. La mise à jour du *ratio*, donc, doit tenir compte des prescriptions du droit universel ainsi que de celles qu'on retrouve dans les documents post-conciliaires s'y reliant. L'étude fait une analyse des normes sur la formation pendant la période de profession temporaire telle que présentée dans le Code de 1983 et les documents subséquents du Saint-Siège. Elle en expose la signification plus profonde en vue d'offrir une ressource pour les instituts religieux qui auraient besoin de revoir leur programme de formation post-noviciat.

Introduction

Formation is an aspect of religious life to which the Church accords serious attention. This is because persons who embrace religious life also assume serious obligations in the Church as the lives and actions of such persons directly affect the witness and fulfillment of the mission of the Church. Therefore, they require proper formation to equip them with the correct understanding of their identity and role in the Church, to achieve the maturity required for lifelong commitment, and to provide them with the necessary skills for apostolic work. The 1983 Code of Canon Law identifies three stages of formation for religious: novitiate, formation during the temporary profession and ongoing formation after perpetual profession, and prescribes norms which regulate every stage. Unlike the 1917 Code, the present Code does not regard the pre-novitiate stage as official stage of formation but recognizes its significance as a preparatory phase before the novitiate (c. 597§ 2). The Church also regards formation of members as a grave responsibility of every religious institute and requires that every institute is to invest resources, time and personnel in formation, to the best of its ability. This is to ensure that members are formed in accordance with the requirements of proper and universal law, and that every stage of formation fulfills its intended aims.

During temporary profession, the Church instructs that the formation begun in earlier stages be perfected, so that the religious may be able to lead the life of the institute more fully and carry out its mission more effectively (cf. c. 659 § 1). To this end, the Church requires that individual institutes draw up a *ratio* or programme for this formation which specifies its structure and duration. This *ratio* is to be drawn up in such a way that it prepares members in formation to meet the needs of the present times, according to the nature and character of the institute.

Post-novitiate formation for lay religious is an innovation of Vatican II which had its recognition in the instruction *Renovationis causam*¹ and acquired its juridical determination in the 1983 Code in canons 659-661. These norms have their sources in conciliar documents² and are supplemented with successive documents of the Holy See which further specify the application of the law and respond to particular requirements of formation.³ Therefore, the *ratio* is to take into account the provisions of universal law and the directives found in related official Church documents, and consideration of its continuous updating in view of constantly changing realities within religious institutes, the Church and the cultural background of candidates to religious life. This implies that those charged with the responsibility of drawing up or revising the *ratio* of post-novitiate formation possess adequate knowledge and understanding of the requirements of universal law. Regrettably, some of the difficulties and challenges religious institutes face with regard to formation are due to inadequate knowledge and understanding of the requirements of the law and consequently, poorly designed *ratio*.

¹ CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, Instruction on the Renewal and Adaptation of Formation for Living the Religious Life *Renovationis causam*, January 6, 1969 (=RC), in AAS, 61 (1969), 103-120, English translation in *FLANNERY I*, 634-655 dedicated particularly to formation of religious.

² See CONGREGATION FOR CATHOLIC EDUCATION, *Ratio fundamentalis institutionis sacerdotialis*, January 6, 1970, in AAS, 62 (1970), 321-384, English translation in *The Pope Speaks*, 15 (1970), 264-314; CONGREGATION FOR RELIGIOUS, Instruction on Careful Selection and Training of Candidates for the State of Perfection and Sacred Orders *Religiosorum institutio*, February 2, 1961, in *CLD*, vol. 5, 452-486. See also SECOND VATICAN COUNCIL, Decree on the Up-to-date Renewal of Religious Life *Perfectae caritatis*, October 28, 1965 (=PC), no. 18, in AAS, 58 (1966), 710, in *FLANNERY I*, 621; ID, Decree on the Pastoral Office of Bishops in the Church *Christus Dominus*, October 28, 1965 (=CD), no. 16, in AAS, 58 (1966), 680, in *FLANNERY I*, 572; PAUL VI, motu proprio *Ecclesiae Sanctae, II*: Norms for Implementing the Decree on the Adaptation and Renewal of Religious Life, August 6, 1966 (=ES II), no. 19, in AAS, 58 (1966), 778, in *FLANNERY I*, 628; SECOND VATICAN COUNCIL, Decree on the Ministry and Life of Priests *Presbyterorum ordinis*, December 7, 1965 (=PO), no. 19, in AAS, 58 (1966), 1019, in *FLANNERY I*, 897; OT, no. 22, in AAS, 58 (1966), 726, in *FLANNERY I*, 723-724.

³ See CONGREGATION FOR INSTITUTES OF CONSECRATED LIFE AND SOCIETIES OF APOSTOLIC LIFE, Directives on Formation in Religious Institutes *Potissimum institutioni*, February 2, 1990 (=PI), in AAS, 82 (1990), 470-532, English translation in *Origins*, 19 (1989-1990), 677, 679-699, a follow up of RC; JOHN PAUL II, Post-synodal Apostolic Exhortation on the Consecrated Life and Its Mission in the Church and in the World *Vita consecrata*, March 25, 1996 (=VC), nos. 63-71, in AAS, 88 (1996), 437-447, in *L'Osservatore Romano*, English ed., April 3, 1996, supplement, 12-13; CONGREGATION FOR INSTITUTES OF CONSECRATED LIFE AND SOCIETIES OF APOSTOLIC LIFE, Instruction on Inter-Institute Collaboration for Formation *Attenta alla condizioni*, December 8, 1998, in *Enchiridion Vaticanum*, vol. 17, 1339-1373, in *CLD*, vol. 14, 591-623.

Therefore, this study attempts to contribute to a deeper understanding of what the Church prescribes on formation during temporary profession in the 1983 Code and the subsequent Holy See documents. Such an understanding can be useful for the revision of proper law of religious institutes on post-novitiate formation.

The first section of this study presents the formulation and development of the canons on religious formation (cc. 659-661) and offers an analysis of their content, in order to gain a deeper understanding of the teachings and the discipline of the Church regarding the formation of religious. The second part treats other universal norms on formation during temporary vows which regulate the duration, the tasks of those charged with formation, the rights and obligations of those in temporary vows and the manner in which this formation is concluded. The last section of the study considers magisterial documents issued after the promulgation of the Code to gain insight into the progression of thought in the Church regarding formation of religious in the light of the emerging realities and challenges facing religious life in general, and formation in particular.

1 — *The Norms on Formation during the Period of Temporary Vows in the 1983 Code of Canon Law*

This section attempts to expose the deeper meaning of the norms on formation during temporary vows by tracing the roots of these norms, their formulation during the revision of the Code and their final form in the 1983 Code. These norms are then analyzed using the canonical rule of understanding ecclesiastical laws provided in canon 17.⁴

⁴ Merely ecclesiastical laws are human positive laws enacted by the ecclesiastical legislator. They are to be understood as c. 17 states: “in accord with their proper meaning of the words in their text and context.” For more about understanding ecclesiastical laws, one can refer to some recent monographs on c. 17: P.J. BROWN, *Canon 17 CIC 1983 and the Hermeneutical Principles of Bernard Lonergan*, Rome, Editrice Pontificia Università Gregoriana, 1999; C. D’SOUZA, *Approach to the Interpretation of the 1983 Code according to Canon 17 and the Literary Critical Theory*, Rome, Pontificia Universitas Urbaniana, 1994; W. KOWAL, *Understanding Canon 17 of the 1983 Code of Canon Law in Light of Contemporary Hermeneutics*, Lewiston, NY, The Edwin Mellen Press, 2000; P. SANTOSO, *The Rules of Interpretation according to Canon 17: Searching the Will of the Legislator inside the Words of Law*, Rome, Pontificia Studiorum Universitas a S. Thoma Aquinate in Urbe, 1986.

1.1 — Formulation of Canon 659 on Formation of Members of Religious Institutes

This subsection reviews the evolution of canon 659, which is essential for gaining a deeper understanding of both its letter and spirit.

1.1.1 — Sources of Canon 659 § 1 and § 2

Canon 659 § 1 has its sources in the General Statutes on the Religious, Clerical, and Apostolic Training to Be Imparted to Clerics in the States of Perfection to Be Acquired, no. 8 § 2,⁵ the Decree on the Ministry and Life of Priests *Presbyterorum ordinis*, no. 19, the Document on Basic Scheme for Priestly Training *Ratio fundamentalis institutionis sacerdotalis*, no. 100,⁶ the Decree on Norms for Implementing the Decree on the Adaptation and Renewal of Religious Life *Ecclesiae Sanctae*, II, no. 3, the Instruction on the Renewal and Adaptation of Formation for Living the Religious Life *Renovationis causam*, nos. 4 and 10, and the Decree on the Training of Priests *Optatum totius*, no. 22. *Statuta generalia*, no. 8 § 2 stresses continued formation for clerical religious during the time between definitive incorporation and ordination (*Statuta generalia*, no. 8 § 2). *Presbyterorum ordinis*, no. 19 emphasizes continuous formation of priests for spiritual vitality, apostolic effectiveness and solid foundation in their knowledge of the Magisterium and Sacred Scriptures.⁷ *Ratio fundamentalis institutionis sacerdotalis*, no. 100 points to lifelong training of priests in spiritual, doctrinal and pastoral fields,

⁵ CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, General Statutes on the Religious, Clerical, and Apostolic Training to Be Imparted to Clerics in the States of Perfection to Be Acquired, July 7, 1956 (= *Statuta generalia*), English translation *The Apostolic Constitution, Sedes Sapientiae and the General Statutes Annexed to It, on the Religious, Clerical, and Apostolic Training to be Imparted to Clerics in the States of Perfection to be Acquired*, Washington, DC, Catholic University of America, 1957, 23.

⁶ A revised version of this document was published by the Congregation for Catholic Education on March 19, 1985, in light of the new Code (CONGREGATION FOR CATHOLIC EDUCATION, *Ratio fundamentalis institutionis sacerdotalis*, March 19, 1985, English translation in *Norms for Priestly Formation*, vol. 1, Washington, DC, National Conference of Catholic Bishops, 1993, 15-60). The 1983 Code of Canon Law recognized three dimensions: academic, pastoral, and spiritual in priestly formation. A subsequent document, the Post-synodal Apostolic Exhortation on the Formation of Priests in the Circumstances of the Present Day *Pastores Dabo Vobis* by John Paul II introduced a fourth dimension: human dimension (JOHN PAUL II, Post-synodal Apostolic Exhortation on the Formation of Priests in the Circumstances of the Present Day *Pastores dabo vobis*, March 25, 1992, no. 72 in AAS, 84 [1992], 783-787), in *Origins*, 21 (1991-1992), 752-753.

⁷ *PO*, no. 19, in AAS, 58 (1966), 1019-1020, in *FLANNERY I*, 897-898.

with emphasis on the first year after ordination, for ministerial and pastoral effectiveness.⁸ *Ecclesiae Sanctae*, II, no. 33 emphasizes experiential formation which safeguards the special character of the individual institute.⁹ *Renovationis causam*, no. 4 recommends gradual and extended formation from the time of the novitiate and the years following first temporary commitment.¹⁰ *Renovationis causam*, no. 10 recognizes the time of temporary vows as probationary.¹¹ *Optatam totius*, no. 22 recommends the continuation of perfection of priestly training after seminary studies for ministerial appropriateness and apostolic effectiveness.¹²

Canon 659 § 2 has its source in the Decree on the Up-to-date Renewal of Religious Life *Perfectae caritatis*, no. 18, *Ratio fundamentalis institutionis sacerdotalis*, no. 101, *Ecclesiae Sanctae*, II, no. 38. *Ratio fundamentalis institutionis sacerdotalis*, no. 101 outlines a scheme recommended to Episcopal conferences for the post-seminary training of priests.¹³ This scheme is to include the renewal and updating of pastoral and doctrinal aspects of priestly ministry. In addition, the structure of the scheme is to be such that studies and pastoral ministry are coordinated and harmonized. *Perfectae caritatis*, no. 18 links effective solid adaptation and renewal of religious life to post-novitiate formation, which is to be given according to the capacity of the candidate, mindful of the present times and circumstances of today's society.¹⁴ *Ecclesiae Sanctae*, II, no. 38 mandates each institute, after adequate experimentation with the directives of *Renovationis causam*, to draw up its own norms on formation.¹⁵

The sources of canon 659 § 1 and § 2 recognize the significance of the post-seminary or post-novitiate formation as a means of perfecting the formation begun in the seminary for priests or the novitiate for temporarily professed. This formation is to be gradual, adapted to the capacity of the candidate, solid, harmonized and configured to the special character of individual institutes. Each institute or Episcopal conference is to draw up its programme for this formation.

⁸ *RFIS*, no. 100, in *AAS*, 62 (1970), 382-383, in *The Pope Speaks*, 15 (1970), 313.

⁹ *ES II*, no. 33, in *AAS*, 58 (1966), 781, in *FLANNERY I*, 631.

¹⁰ *RC*, no. 4, in *AAS*, 61 (1969), 107-108, in *FLANNERY I*, 639-640.

¹¹ *RC*, no. 10, in *AAS*, 61 (1969), 112, in *FLANNERY I*, 645.

¹² *OP*, no. 22, in *AAS*, 58 (1966), 726-727, in *FLANNERY I*, 723-724.

¹³ *RFIS*, no. 101, in *AAS*, 62 (1970), 383-384, in *The Pope Speaks*, 15 (1970), 314.

¹⁴ *PC*, no. 18, in *AAS*, 58 (1966), 710, in *FLANNERY I*, 621.

¹⁵ *ES II*, no. 38, in *AAS*, 58 (1966), 781, in *FLANNERY I*, 632.

1.1.2 — Development of Canon 659 § 1 and § 2 in the Drafting Process

The text of the first draft of canon 64 of the *Schema canonum de institutis vitae consecratae* of 1977 reads:

§ 1. In singulis Institutis iure proprio definiatur institutionis ratio et duratio quae post primam professionem sodalibus tradenda est.

§ 2. Perdurante tempore huius institutionis sodalibus officia et opera ne committantur quae eam impedian.¹⁶

The text underwent some changes in the subsequent *schemas*. In the 1980 draft, printed as canon 585, the word *cooptatio* in § 1 was replaced with *professio*, as the 1980 *Schema* had rejected the option of consecration by means of other bonds, as proposed by *Renovationis causam*.¹⁷

Paragraph two also had some changes in the 1980 draft. The word *constitutiones* was replaced with *ius proprium*, pursuant to c. 90 of the 1977 *Schema*, which recognized that the term “constitutions” does not encompass all the internal legislation of religious institutes. Therefore, “proper law” was more appropriate.

The Secretary of the subcommission remarked that the *Schema* placed more emphasis on “the programme of formation,” which had already been treated in the draft on the People of God under the section of “Formation of Clerics” and which had overlooked the necessity of formation of religious. In response to this observation, the word *huiusmodi* was replaced with *huius* and the words *durationem et* switched position with *eiusdemque durationis*, to stress that the *Schema* specifically focused on the programme of post-novitiate formation of lay religious and its duration, not formation in general, as was presented in the earlier draft. Paragraph three was moved to canon 586 of the 1980 *Schema*.¹⁸

One consultor pointed out that paragraphs 1 and 2 of the canon had treated the formation of religious in general, while the third paragraph was specifically concerned with religious “who are preparing to receive holy orders.” Another consultor insisted on the necessity and importance of formation after first profession, before the person is initiated into apostolic work. However,

¹⁶ *Communicationes*, 13 (1981), 175: “§ 1. In individual Institutes the programme and duration of formation which should be given to its members after first profession must be defined by its proper law. § 2. During the time of this formation, offices and tasks which may impede it are not to be entrusted to the members.”

¹⁷ *RC*, no. 34, in *AAS*, 61 (1969), 118, in *FLANNERY*1, 653.

¹⁸ See E.N. PETERS, *Incrementa in progressu 1983 Codicis iuris canonici*, Montréal, Wilson and Lafleur Limitée, 2005, 608-609.

the secretary preferred canon 64 of the 1977 *Schema* and the others were in agreement with him. They decided that the following amended text be accepted:

§ 1. In singulis Institutis, post primam professionem omnium sodalium institutio perficiatur ad vitam Instituti propriam plenius ducendam et ad eius missionem aptius proseguendam.

§ 2. Quapropter ius proprium rationem definire debet huius institutionis eiusdemque durationis, attentis Ecclesiae necessitatibus atque hominum temporumque conditionibus prout a fine et indole Instituti exigitur.¹⁹

The text had no further changes in the subsequent *Schemas* up to its promulgation in the 1983 Code.²⁰ Thus, the text promulgated as canon 659 § 1 and § 2 in the 1983 Code reads:

§ 1. In singulis institutis, post primam professionem omnium sodalium institutio perficiatur ad vitam instituti propriam plenius ducendam et ad eius missionem aptius proseguendam.

§ 2. Quapropter ius proprium rationem definire debet huius institutionis eiusdemque durationis, attentis Ecclesiae necessitatibus atque hominum temporumque condicionibus, prout a fine et indole instituti exigitur.²¹

1.1.3 — Analysis of Canon 659 § 1 and § 2

In its first part, c. 659 § 1 reads:

In individual institutes the formation of all the members is to be continued after first profession so that they lead the proper life of the institute more fully and carry out its mission more suitably.

The canon directs that, after first profession, formation of members is to be perfected for the purpose of the overall end of formation of every institute,

¹⁹ *Communicationes*, 13 (1981), 175-1761: “§ 1. In individual institutes the formation of all members is to be continued after first profession so that they lead the proper life of the institute more fully and carry out its mission more suitably. § 2. Therefore, proper law must define the programme of this formation and its duration, attentive to the needs of the Church and the conditions of people and times, insofar as the purpose and character of the institute require it.”

²⁰ For a detailed presentation of the process of the formulation and development of canon 659 to its final version, see PETERS, *Incrementa in progressu*, 608-609.

²¹ “§ 1. In individual institutes, the formation of all the members is to be continued after first profession so that they lead the proper life of the institute more fully and carry out its mission more suitably. § 2. Therefore, the constitutions must define the program of this formation and its duration, attentive to the needs of the Church and the conditions of people and times, insofar as the purpose and character of the institute require it.”

which is living its life fully and responding to its mission effectively. The canon recognizes the inadequacy of novitiate formation to prepare a member for permanent commitment and the need for continuity and constancy of formation as a lifelong project aimed at the integration of life. Repeating the conciliar intention, the text reaffirms formation of religious as an intrinsic aspect of religious life and a lifelong process which involves gradual and progressive growth towards maturity.²²

The phrase, “in individual institutes,” implies that formation is a right and obligation of all members in all institutes, whether apostolic or contemplative in nature. As this is a question of a right, the responsibility of all members toward formation is indicated: besides superiors and formators who are directly involved in formation work, every member of the religious family has a duty towards contributing to the formation of younger members, at the community and personal level, by the witness of their lives,²³ by prayer or by willingness to give input on areas of formation in which they have appropriate skills.²⁴

The phrase, “in individual institutes” also implies that the formation during the period of temporary vows is to be configured to the character and purpose of each institute. The Instruction on Inter-Institute Collaboration for Formation clarifies that, in the event of inter-institute collaboration on formation initiatives, input from such ventures is to be harmonized with the ends of the institute and that the duty and responsibility of each individual institute to form its members is not to be compromised or substituted with such initiatives.²⁵

Canon 659 § 1 continues: “[...] so that they lead the proper life of the institute more fully and carry out its mission more suitably. [...]” According to the wording of the canon, the quality of religious life and the effectiveness of the mission in the Church of individual religious institutes depend on the ongoing formation of members. The text connects the purpose of post-novitiate formation to the ends of the institute, that is, its life and its mission

²² See SMITH, “Commentary on Formation of Religious (cc. 659-661),” 826.

²³ Joan Faber remarks: “[...] formation is mutual, individual and collective. All members of a religious institute are to engage in the formation of genuine, apostolic communities and individuals. The obedient community involved in a corporate search and response to the Spirit can give hope to all, and strength to the individual member” (J. FABER, “Formation and Commitment in the New Code,” in *The Way Supplement*, 50 [1984], 41).

²⁴ See c. 652 § 4, which is reaffirmed in *PI*, no. 53, in *AAS*, 82 (1990), 505, in *Origins*, 19 (1989-1990), 690.

²⁵ See *Attenta alla condizioni*, no. 13, December 8, 1998, in *Enchiridion Vaticanum*, vol. 17, 1352, in *CLD*, vol. 14, 603.

according to its purpose and character. The canon recognizes that novitiate formation does not provide the maturity required for permanent commitment in religious life. The nature of formation during temporary vows is to deepen what has been built during the novitiate.²⁶

Post-novitiate formation, besides deepening the understanding of the obligations of religious life specified in canon 654, is to orientate the candidate to a more profound knowledge of the patrimony of the institute as described in canon 578, the charism (c. 577) and the constitutions (c. 587). The text uses the adjective “more” to emphasize the quality of the life and of the mission of the individual institute. The stress is on the fuller and deeper realization of integration of religious life of the individual member, which is the intended outcome of this formation. Aspects of the life of the institute like renewal, evaluation of the life of the institute, challenges and new strategies, are to be included in the structure of this formation, to ensure that candidates are well oriented into the life and mission of the institute before they make a permanent commitment to it.

Canon 659 § 2 reads:

Therefore, proper law must define the program of this formation and its duration, attentive to the needs of the Church and the conditions of people and times, insofar as the purpose and character of the institute require it.

The canon directs institutes to draw up their own formation programmes. The text reflects the spirit of subsidiarity and the recognition of the autonomy of individual institutes envisioned in the conciliar teachings. If those being formed are to “lead life proper to the institute more fully and fulfill its mission more effectively,”²⁷ it is only fitting that they be trained by means of a well-structured and definite programme which spells out the format, scope and duration of formation during temporary vows. In drawing up norms for the programme, J. Hite explains that the substantial parts and general principles which are not easily modified can be put in the fundamental law, while

²⁶ See ANDRÉS, “Commentary on Religious Institutes (cc. 607-709),” 1752. See also M.E. PENET, “Why a Juniorate?,” in *Sisters Formation Bulletin*, vol. 7, no. 1 (1960), 4. For extensive reading on post-novitiate formation, see R. BRADLEY (ed.), *The Juniorate in Sister Formation: Proceedings for the Sister Formation Conference for 1957-1958*, New York, Fordham University Press, 1960; S.E. SANTOS, “The *Ratio formationis*: Expression and Exigency of the Identity of a Religious Institute,” in *Consecrated Life*, vol. 16, no. 2 (1991), 133-147; B. PENNINGTON, “The Temporary Profession of Monks – A Proposal,” in *The Jurist*, 27 (1967), 82-84; G.R. MURPHY, “Candidates and Community: Mutual Formation,” in *The Way Supplement*, 62 (1988), 25-32; E. KINERK, “Formation for Vows,” in *The Way Supplement*, 71 (1991), 64-72.

²⁷ Canon 659 § 1.

those aspects which can be revised easily are best placed in directories or policies.²⁸

The following part of c. 659 § 2 states: “attentive to the needs of the Church and the conditions of people and times, insofar as the purpose and character of the institute require it.” The wording of the text reinforces the apostolic and the spiritual nature of this formation. It is to orient the candidate to the mission of the institute performed in the ecclesial context and to achieve the necessary maturity for permanent commitment. Therefore, it should, as E. Gambari explains, prepare religious to live and act in definite circumstances, place and time.²⁹ He adds that the formation programme is to be specific in its content and aims, which are to correspond to the proper character and nature of the institute.³⁰ The canon envisions formation characterized by ecclesial awareness and apostolic preparedness, mindful of the cultural realities of the candidate, the emerging realities in religious life and the changes in the world.³¹

1.2 — Formulation of Canon 660 on the Pedagogy of Formation

The formulation of canon 660 reflects its development and the changes it underwent after its first appearance in 1977 draft, its modifications in the subsequent *Schemas* of 1980 and 1982 and its final form in the 1983 Code.

1.2.1 — Sources of Canon 660

Canon 660 § 1 has its sources in Pius XII’s apostolic letter *Sedes sapientiae*, nos. 3 and 4, *Perfectae caritatis*, no. 18, *Ratio fundamentalis institutionis sacerdotalis*, no. 3 and *Mutuae relationes*, nos. 31-32. Pius XII’s apostolic letter *Sedes sapientiae*, in nos. 3 and 4, treats the content and characteristics of the training of priests after seminary. *Perfectae caritatis*, no. 18, recommends formation which harmoniously blends all its components towards integration of religious life. It also recognizes the academic

²⁸ See J. HITE, “Admission of Candidates,” in HITE, HOLLAND, and WARD (eds.), *A Handbook on Canons 573-746*, Collegeville, MN, Liturgical Press, 1983, 162. See also GAMBARI, *The Religious Adult in Christ: Religious Formation before Perpetual Profession, Juniorate Years of Studies Scholasticate*, Boston, St. Paul Editions, 1971, 262.

²⁹ See GAMBARI, *The Religious Adult in Christ*, 266.

³⁰ See *ibid.*

³¹ See SCHNEIDERS, *Selling All: Commitment, Consecrated Celibacy and Community in Catholic Religious Life*, New York/Mahwah, NJ, Paulist Press, 2001, 37.

value of such training if opportunity offers. *Ratio fundamentalis institutionis sacerdotalis*, no. 3, explains that the purpose of priestly formation is to affirm the divine revelation and the magisterial teaching on common and ministerial priesthood. This formation is also to foster brotherly collaboration among priests and a positive relationship with their bishop, marked with trust and generosity. *Mutuae relationes*, nos. 31-32, recommend collaborative initiatives in formation and training by means of establishing centres of higher learning with well-structured pastoral plans and goals that are periodically assessed.

The sources of canon 660 § 1 highlight the objectives and means of post-seminary and post-novitiate formation. Such formation, which may be undertaken through collaborative endeavours, is to lead to the integration of all aspects of the life of the one being formed.

Canon 660 § 2 has its sources in *CIC/17*, c. 598, *Statuta generalia*, no. 26 § 2 and no. 40 § 6-7, *Religiosorum institutio*, no. 49 and *Perfectae caritatis*, no. 18. *Statuta generalia* and *CIC/17*, c. 598, in highlighting the significance of continued formation of clerical religious, cautions against assigning clerical religious duties which impede their formation (no. 26 § 2; *CIC/17*, c. 598 § 2). *Statuta generalia* go on to specify activities which may interfere with formation, including imprudent and unlimited reading of profane literature, listening to the radio and heavy ministerial duties (no. 40 § 6). Therefore, it is recommended that the internal authority ensure that norms which exempt clerical religious undertaking studies are clearly specified in proper law. In case of necessity, superiors, including local ones, can grant dispensation from such duties (no. 40 § 7).

In stressing the need for solid foundation of priestly life, the instruction *Religiosorum institutio*, no. 49 and *CIC/17*, c. 598 § 1 recommend gradual insertion into apostolic ministry and continuation of doctrinal, spiritual, and philosophical training under the guidance of reputable and experienced senior priests and spiritual directors. The priority of this training over apostolic ministry for young priests is emphasized. *Perfectae caritatis*, no. 18, echoing the same message, stresses continued formation after the novitiate and discourages apostolic assignment to religious immediately after the novitiate.

The sources stress the gravity of the requirement of continued formation for newly ordained priests and religious immediately after their first profession to the extent that any apostolic work which may impede it is forbidden. Particular or proper law is to specify such tasks or offices which may jeopardize this formation.

1.2.2 — *Development of Canon 660*³²

The text, which corresponds to that of canon 65 of the *1977 Schema*, is as follows:

§ 1. Institutio sub ductu peritorum consequenda atque capacitati sodalium accommodata, sit, doctrinalis simul ac practica iuxta exigentias instituti titulis etiam congruentibus pro opportunitate obtentis.³³

The text of canon 65 of the *1977 Schema* underwent some modifications in the 1980 draft. Specifically, the words *sub ductu peritorum consequenda atque* were omitted on the basis of a suggestion that a norm which instructs that ongoing formation is to be carried out “under the guidance of experts” be added to the *Schema*. Only one consultor was in favour of the possibility.

The words *sit systematica* and *spiritualis et apostolica* were added to emphasize the unified nature of this formation, that is, integration of its spiritual and apostolic aspects. The words *iuxta exigentias instituti* were omitted, as this formation did not prepare members exclusively for the needs of an individual institute but for the mission of the Church. The words *tam ecclesiasticis quam civilibus* were added as recognition by the subcommission of the academic value such training may possess and to point out that it could be obtained in either ecclesiastical or state institutions.

The Secretary proposed, and the majority accepted, that this text would constitute paragraph one of the canon and that paragraph two of canon 65 of the 1977 draft would become paragraph two of the previous canon (c. 64):

Perdurante tempore huius institutionis, sodalibus officia et opera ne committantur, quae eam impediunt.³⁴

The text was accepted with the addition of the terms: “(...capacitati sodalium) accommodata spiritualis et apostolica, doctrinalis ...”³⁵

³² See *Communicationes*, 13 (1981), 175-176.

³³ PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Schema canonum de institutis vitae consecratae per professionem consiliorum evangelicorum*, Typis polyglottis Vaticanis, 1977, English translation *Schema of Canons on Institutes of Life Consecrated by Profession of the Evangelical Counsels: Draft*, Washington, DC, Publications Office of the United States Catholic Conference, 1977, 38-39: “This training is to be pursued under the direction of experts and accommodated to the capacity of members, should be at one and the same time theoretical and practical in accord with the demands of the institute; further, appropriate certificates are to be obtained as the times may dictate.”

³⁴ *Communicationes*, 13 (1981), 176: “During the period of formation, members are not to be given offices and undertakings which hinder their formation.”

³⁵ “[...] adapted to (the capacity of the members), both spiritual and apostolic, doctrinal [...]” (ibid.).

Therefore, the draft was modified as:

§ 1. Institutio sit systematica, capacitati sodalium accommodata, spiritualis et apostolica, doctrinalis simul ac practica, titulis etiam congruentibus, tam ecclesiasticis quam civilibus, pro opportunitate obtentis.

§ 2. Perdurante tempore huius institutionis, sodalibus officia et opera ne committantur, quae eam impedian.³⁶

The text underwent a slight modification in paragraph one in the 1982 draft, with the word *capacitati* being replaced with *captui*. Thus, the text of canon 586 of the 1982 draft reads:

§ 1. Institutio sit systematica, captui sodalium accommodata, spiritualis et apostolica, doctrinalis simul ac practica, titulis etiam congruentibus, tam ecclesiasticis quam civilibus, pro opportunitate obtentis.

§ 2. Perdurante tempore huius institutionis, sodalibus officia et opera ne committantur, quae eam impedian.³⁷

The text was promulgated in the 1983 Code as canon 660.³⁸

1.2.3 — Analysis of Canon 660

Canon 660 § 1 reads:

Formation is to be systematic adapted to the capacity of the members, spiritual and apostolic, doctrinal and at the same time practical. Suitable degrees, both ecclesiastical and civil, are also to be obtained when appropriate.

The wording of the canon gives directives on the pedagogical organization of post-novitiate formation. This has to do with the format, scope, and duration of the formation, coupled with the availability of favourable conditions for growth of the candidate, such as presence of a formative community and competent directors and teachers.³⁹

³⁶ “§ 1. Formation is to be systematic, adapted to the capability of the members, spiritual and apostolic, doctrinal and at the same time practical. Suitable degrees, both ecclesiastical and civil, are also to be obtained when appropriate. § 2. During the time of this formation, offices and tasks which may impede it are not to be entrusted to the members” (ibid.).

³⁷ PONTIFICIA COMMISSIO CODICIS IURIS CANONICI RECOGNOSCENDO, *Codex iuris canonici: schema novissimum iuxta placita Patrum Commissionis emendatum atque Summo Pontifici praesentatum*, Typis polyglottis Vaticanis, 1982, 123: “§ 1. Formation is to be systematic, adapted to the capacity of the members, spiritual and apostolic, doctrinal and at the same time practical. Suitable degrees, both ecclesiastical and civil, are also to be obtained when appropriate. § 2. During the time of this formation, offices and tasks which may impede it are not to be entrusted to the members.”

³⁸ For the presentation of the process of the drafting of canon 660 to its final version, see PETERS, *Incrementa in progressu*, 608-609.

³⁹ See *PI*, no. 60, in *AAS*, 82 (1990), 508, in *Origins*, 19 (1989-1990), 691. Andrés explains that, for the formation process to achieve its ends, the pedagogy of the entire process is to

The expression “adapted to capacity of members” implies formation focused on the candidate. According to Andrés, it does not refer to adapting to the capacity of the character and nature of the institute but to that of the individual, according to his or her character, intellectual endowment and sensitivity.⁴⁰ This recalls the directive of *Renovationis causam*, no. 7, which emphasizes the maturity of the candidate as the basis of qualification for admission into religious life.⁴¹ Formation is to be individualized, taking into account the age and the progressive development of the individual’s personality. Jeanne D’Arc notes that formators are to be mindful of the gifts and talents of the individual and capitalize on them. This will ensure that the goals of formation are best realized and any harm to the member, especially through intellectual training for which he or she lacks the aptitude, is avoided.⁴² Sandra Schneiders adds that different candidates may require emphasis on specific aspects of formation, since one candidate may have professional maturity but lack maturity in spiritual and doctrinal aspects.⁴³ Schneiders recommends that the process of formation pay attention to the family, cultural and social background of the candidate in view of the realities of the present human society, which is often characterized by permissiveness, violence, consumerism, lack of moral formation, and broken families.⁴⁴

Building on c. 652, the text specifies the areas of formation in both content and characteristics. The phrase “at the same time” implies integration and harmonization of the content and methodology of the specified aspects of formation. While all the components are to be imparted individually, the

be structured so that the programme is planned positively with efficacious initiatives and specific periodic evaluation of its achievements. It is to be harmonized, introduced gradually and carried out in a conducive environment by teachers and formators chosen for their competence and experience. See ANDRÉS, “Commentary on Religious Institutes (cc. 607-709),” in *Exegetical Comm*, vol. 2/2, 1756.

⁴⁰ ANDRÉS, “Commentary on Religious Institutes (cc. 607-709),” 1756. Sandra Schneiders adds that this formation is to take into account the age, experience, faith background of the candidate, to avoid leveling off of candidates. See SCHNEIDERS, *Selling All*, 38.

⁴¹ Maturity is an elusive concept. It develops throughout the course of a lifetime, as the result of a personal response to a wide variety of experiences. It certainly does not come from an academic study of books on the characteristics of the mature person, and no instructor or system of instruction is going to infuse maturity. See J. HARRIOT, “A Note on Formation Personnel,” in *The Way Supplement*, 8 (1969), 243. The author goes on to explain that, every order and congregation is looking for an individual who is human, who is masculine or feminine, who is Christian and who, as such, is willing to adopt the life-style of this or that congregation. See *ibid.*, 244.

⁴² See J. D’ARC, *Witness and Consecration*, London, Chapman, 1966, 130.

⁴³ See SCHNEIDERS, *Selling All*, 55.

⁴⁴ See *ibid.*

process is to be oriented in such a manner that there is coordination and integration amongst them, as each aspect needs the others. Jeanne D'Arc explains that the apostolic life of religious requires a spiritual and solid doctrinal basis for eschatological witness. She continues to point out that since there are apostolates to be performed, practical formation cannot be omitted.⁴⁵ Elio Gambari concurs that doctrinal formation, carried out profoundly, nourishes the spiritual life, which communicates, defends and explains it in ministry.⁴⁶

Such harmony and integration is to ensure that the apostolic dimension of an institute according to its nature and character is imbued with its spirituality. It also ensures that the doctrinal formation which orients the candidate to a deeper understanding and appreciation of the Magisterium, Tradition, Sacred Scriptures and theological understanding of consecrated life is fused together in a practical sense. This is to help the candidate acquire a deeper ecclesial mind, sensitive to the needs of the Church and docility to the Spirit, motivated by apostolic zeal to carry out the mission of the institute and to live its life more fully.⁴⁷

Sandra Schneiders admits that harmonizing all the aspects of formation in a given timeline ordered for assessment and suitability for final commitment can be burdensome, because formation continues alongside studies, community life, apostolic ministry and the day-to-day living of the obligations of religious life. This can be overwhelming for the candidate, even with the most well-planned structure.⁴⁸ D'Arc adds that the kind of studies required for the various components of this formation usually take up too much of the total probationary period, making it difficult for candidates to maintain proper synthesis of the components required for achieving the maturity required for perpetual commitment.⁴⁹ Those responsible for formation must be conscious of these realities and design structures which focus more on integration than on the quantity of input.

The canon recognizes the academic value of formation and the possibility of it being offered in institutions outside the institute. The justification of the academic value of formation is based on the relevance, aptitude, and professionalism which are to characterize the apostolic endeavours of individual religious, as well as justice to those being served. Post-novitiate formation which includes apostolic formation aims at empowering the candidate to

⁴⁵ See D'ARC, *Witness and Consecration*, 114.

⁴⁶ See GAMBARI, *The Religious Adult in Christ*, 71.

⁴⁷ See SCHNEIDERS, *Selling All*, 58.

⁴⁸ See *ibid.*, 68.

⁴⁹ See D'ARC, *Witness and Consecration*, 121.

fulfill the apostolic mission of the institute. Such activities are usually in the form of a specific occupation for which one qualifies after acquiring the necessary skills and competence.⁵⁰ The specific professions, besides the religious and their institutes, also benefit the Church and society. Therefore, religious, like any other professionals, must meet the standards laid down by the laws of a given nation.⁵¹ Sandra Schneiders adds that the possibility of obtaining academic qualifications is also a means of enhancing diligence and seriousness on the part of the religious and of ensuring professional security and the benefits which accrue from it. Just like candidates to the priesthood, religious are also formed to be in service to the Church. Therefore, they require some level of theological and doctrinal competence to enable them to meet the demands of pastoral action within the Church.⁵² Such qualifications are also important in the context of apostolic efficacy and relevance. As D'Arc notes, techniques and skills of specific professions tend to quickly change and become out of date, calling for further studies. Religious who perform their apostolic works as "professionals" are no exception.⁵³

The possibility of professional training being undertaken in ecclesiastical and state institutions of higher learning is implied in *Perfectae caritatis*, no. 18. The decree recommends that such training be carried out in "a suitable residence," an environment sensitive to the formative status of the candidate. Superiors and those in charge of formation have the task of ensuring that there is a balance between the environment which respects religious formation and the needs of such studies, as well as the maturity of the religious.

Paragraph §2 of c. 660 reads:

During the time of this formation, offices and tasks which may impede it are not to be entrusted to the members.

Recalling *Perfectae caritatis*, no. 18, it affirms the priority of formation after the novitiate over other activities. Conscious of the grave necessity of

⁵⁰ See GAMBARI, *The Religious Adult in Christ*, 150.

⁵¹ Sandra Schneiders explains that professional qualification is an obligation of justice. Since in most countries, it is a requirement for all persons who carry out professional work to possess certain qualifications valued for their academic significance, such as academic degrees, religious are no exception, if they are to engage in such fields. See SCHNEIDERS, *Selling All*, 58.

⁵² See *ibid.*, where the author suggests that competence in the pastoral apostolate requires religious to have an equivalent of a Masters degree in divinity which would acquaint them with the sources of Catholic theology, including major methodologies and schools of classical and contemporary theological thought, as well as the theology and spirituality of religious life.

⁵³ See D'ARC, *Witness and Consecration*, 150.

this formation in helping the candidates towards integration and unity of religious life necessary for permanent commitment, the canon cautions against any occupations or offices which may jeopardize its process and purpose. As J. Hite explains, even for the best and most justifiable reasons, such as pressure of apostolate, giftedness and professional efficiency of the candidate for the office or task at hand, duties and offices which take away the focus on formation are not to be committed to them. He adds that formation is not only for the apostolate but for attaining the maturity to lead the life and to carry out the mission of the institute. Indeed, apostolic works carried out by religious in formation have probationary and formative dimensions; such works are not to be so burdensome to the extent that formation is compromised.⁵⁴

The norm of the canon is directed to the internal authority of the institute, which possesses the competence to assign tasks and offices to members. Pursuant to the provisions of c. 618, the text is a reminder to superiors of the manner in which they are to exercise their authority over members: in a spirit of service, care and love. Therefore, it is their duty to ensure that members in formation are not burdened with apostolic obligations which leave no room for their formation. Andrés suggests that the proper law of institutes is to determine the kinds of tasks and offices which would impede formation and also to make clear provisions on the manner of assigning religious to works and offices outside the institute.⁵⁵ This calls on competent superiors to ensure that proper clarity exists with regard to responsibilities, job description, and time for holidays, working environment and structures which respect the formation aspect of the religious, especially on those assignments outside the institute.⁵⁶

1.3 — Formulation of Canon 661 on the Responsibility of Members and of the Institute on Formation

This section discusses the sources and the adjustments of c. 661, from its first appearance in the 1977 *Schema* up to its final wording in the 1983 Code.

⁵⁴ See HITE, "Admission of Candidates," 164.

⁵⁵ ANDRÉS, "Commentary on Religious Institutes (cc. 607-709)," 1758.

⁵⁶ See CONGREGATION FOR BISHOPS AND CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, Directives for Mutual Relations between Bishops and Religious in the Church *Mutuae relationes*, May 14, 1978 (=MR), no. 57, in AAS, 70 (1978), 502, in *FLANNERY2*, 239-340; c. 678 § 2 and § 3. See also *PI*, nos. 66-71, in AAS, 82 (1990), 510-514, in *Origins*, 19 (1989-1990), 691-693.

1.3.1 — Sources of Canon 661

Canon 661 has its sources in *Statuta generalia*, nos. 50-53,⁵⁷ *Sedes sapientiae*, no. 4, *Christus Dominus*, no. 16, *Perfectae caritatis*, no. 18, *Presbyterorum ordinis*, no. 19, *Ecclesiae Sanctae*, II, no. 19, *Ratio fundamentalis institutionis sacerdotalis*, no. 100, *Mutuae relationes*, no. 14 and *CIC/17*, c. 129. *Christus Dominus*, no. 16, affirms the duty of bishops to provide opportunities for apostolic updating and spiritual renewal in suitable centres of learning, so that candidates lead pious lives and fulfill their ministry faithfully and fruitfully. *Presbyterorum ordinis*, no. 19, urges priests to be willing to take up studies in updating themselves for pastoral and apostolic works. The bishops are to provide the means and resources for such studies, especially a few years after priestly ordination.

Perfectae caritatis, no. 18, affirms the responsibility of individual religious for their ongoing formation and that of the superiors to make means and time available for this. *CIC/17*, c. 129 prescribes that training of priests in sacred sciences, tradition and solid doctrine from the Magisterium be continued after ordination and that profane sciences be avoided. *Statuta generalia*, no. 50, points out the significance of the conferences on morals and liturgy mentioned in *CIC/17*, c. 313 which the local ordinary obliges all the clergy in his diocese to attend under pain of the penalty specified in *CIC/17*, c. 2377. *Statuta generalia*, no. 51, highlights the significance of the integration of spiritual and apostolic training of young priests and religious. This is to be through spiritual direction, self-evaluation, probation and renewals. Formation is also to include moral, religious and priestly education, coupled with faithfulness in priestly virtues, lengthy spiritual exercises and attendance of conferences and instructions on the knowledge of the institute. It is to be organized in accordance with the nature, character and purpose of the institute, taking into account the institute's proper law (*Statuta generalia*, no. 52). The final probation for clerical religious is obligatory for all members. In circumstances where it is impossible to offer it, this must be supplied for by other substitutes (*Statuta generalia*, no. 53). *Mutuae relationes*, no. 14, underlines the grave duty of superiors to foster fidelity to the charism and suitable renewal for religious life by means of fitting and updated formation. *Ecclesiae Sanctae*, II, no. 19, places the responsibility for suitable renewal on both the members and the internal authority of institutes. *Presbyterorum ordinis*, no. 19 highlights the personal responsibility of priests for apostolic and spiritual training and for the pastoral updating required for present times. *Ratio fundamentalis institutionis sacerdotalis*,

⁵⁷ *Statuta generalia*, nos. 50-53, in *The Apostolic Constitution Sedes Sapientiae and the General Statutes Annexed to It*, 67-70.

no. 100, and *Sedes sapientiae*, no. 4, prescribe lifelong training for priests which is progressively perfected in the spiritual, doctrinal, pastoral and intellectual fields, especially for young priests.

The sources of canon 661 recognize ongoing formation as an obligation and a right for individual priests and religious, as well as a duty of their respective authorities.

1.3.2 — *Development of Canon 661*

The text, which corresponds to that of canon 66 of the 1977 draft, reads:

Per totam vitam sodales culturam, spiritualement, doctrinalement et technicam sedulo prosequi intendant et Moderatores pro posse adiumenta et tempus ad hoc eis procurent.⁵⁸

The canon underwent some changes in the 1980 draft. The phrase *sodales culturam* was replaced with *religiosi formationem suam*, to distinguish this formation as specifically focused on professed members and not all members of an institute. The word *technicam*, a term which limits this formation to mere acquisition of skills and abilities, was replaced with a more appropriate term, *practicam*, which broadened the understanding of this formation as that which equips members with the ability to adapt, apply and perfect what has already been learnt. The phrase *prosequi intendant* was replaced by *prosequantur* and *Moderatores pro posse* by *Superiores*, while *eis* was moved from before the word *procurent* to before the word *adiumenta*. The word *Moderatores* changed to *Superiores*, following an earlier decision by the subcommission to replace certain terminologies which were not inclusive to all forms of consecrated life with more appropriate ones.⁵⁹ By the above changes, the subcommission affirmed that formation of religious after first profession is obligatory for all institutes. The internal authority of every institute has the responsibility to facilitate this formation and individual members are obliged to initiate it. The bracket also extended to the last word. Thus, the text of the 1980 draft reads:

Per totam vitam religiosi formationem suam spiritualement, doctrinalement et practicam sedulo prosequantur et Superiores eis adiumenta et tempus ad hoc procurent.⁶⁰

⁵⁸ *Communicationes*, 9 (1977), 57.

⁵⁹ *Communicationes*, 13 (1981), 177: "Through their entire life, religious are to continue diligently their spiritual, doctrinal, and practical formation. Superiors, moreover, are to provide them with the resources and time for this."

⁶⁰ McDONOUGH, *Ready Reference for the 1980 Schema*, 142: "throughout their entire life, religious should foster their own spiritual, doctrinal and practical formation and superiors should provide them the time and means to do this."

The 1982 draft retained the text, with the addition of the word *autem* before the word *eis*:

Per totam vitam religiosi formationem suam spiritualem, doctrinalem et practicam sedulo prosequantur et Superiores autem eis adiumenta et tempus ad hoc procurent.⁶¹

No further changes occurred and the text retained its form in the 1983 Code as canon 661.

1.3.3 — Analysis of Canon 661

Canon 661 reads:

“Through their entire life, religious are to continue diligently their spiritual, doctrinal, and practical formation. Superiors, moreover, are to provide them with the resources and time for this.”

The canon treats the second aspect of post-novitiate formation, which is oriented more towards fidelity to their vocation than preparedness for permanent commitment. The text spells out the responsibility of religious for their own formation, not only during temporary vows but throughout their lives.⁶² Deriving from the nature of their consecration and the demands of the mission of the institute, all religious require continuous spiritual, doctrinal and practical renewal for their personal growth and effectiveness in ministry.⁶³ As Rincón-Peréz notes, there is no time in the life of a religious when self-sufficiency, ideal maturation and total configuration to the person of Christ may be claimed to be complete.⁶⁴

The canon uses the Latin expression *sedulo prosequantur* which means “to continue carefully.” With this choice of words, the legislator demonstrates a consciousness of the challenges individual religious may encounter in taking up opportunities for ongoing formation. The canon seems to

⁶¹ PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Codex iuris canonici: schema novissimum*, 123: “Through their entire life, religious are to continue diligently their spiritual, doctrinal, and practical formation. Superiors, moreover, are to provide them with the resources and time for this.”

⁶² See *PI*, no. 67, on the reasons motivating ongoing formation. First, the charismatic and eschatological role of the religious life within the Church requires continued fidelity by means of docility to the Spirit. Second, the challenges that arise from the rapidly changing world demand a prompt response. Lastly, the very life of religious institutes depends in part upon the permanent formation of their members. See AAS, 82 (1990), 511-512, in *Origins*, 19 (1989-1990), 692. See also FABER, “Formation and Commitment in the New Code,” 40.

⁶³ See HITE, “Admission of Candidates,” 165. See also FABER, “Formation and Commitment in the New Code,” 40.

⁶⁴ See RINCÓN-PERÉZ, “Commentary on Institutes of Consecrated Life (cc. 573-746),” 526.

impress upon all religious not to compromise the task of ongoing formation, despite pressure from apostolic commitment, lack of interest, or giving priority to forms of training not directly in line with religious life or the purpose of the institute.⁶⁵

The canon explains that the task of formation of members, pursuant to canon 670, is the duty and responsibility of the institute through its authoritative agents. The canon speaks of “resources” and “time” to be made available by superiors. This responsibility, as Andrés explains, is not a passive one which superiors pass on to members, but one which they take up with commitment and diligence, conscious that ongoing formation of members is an intrinsic aspect of religious life.⁶⁶ Internal authority must ensure that the right to ongoing formation is accorded to members by means of practical initiatives and decisions.

Andrés points out that ongoing formation should not remain merely a good intention, but something which translates into a series of activities undertaken by the superiors. Such initiatives include motivating members to take up opportunities provided to them, intervening in the planning of schedules within apostolic programmes to ensure there is time available for such opportunities, exploring collaborative formation initiatives with other institutes or institutions, and drawing up a realistic budgetary plan which provides financial resources for ongoing formation. It would also include good planning for replacement in apostolates, proper and clear description of works, especially for assignments outside the institute and organizing courses for renewal and for updating members on specific aspects of religious life. It also requires that religious houses have a well-stocked library with subscriptions to journals and reviews relevant to formation and other aspects of religious life. This is all to ensure the constant updating of doctrinal, biblical, spiritual and theological knowledge by the members.⁶⁷

⁶⁵ See HITE, “Admission of Candidates,” 165. The author remarks that while spiritual renewal as an aspect of ongoing formation has primacy over all other aspects, most religious have difficulty in giving it priority in their initiatives for renewal. See also VC, no. 93: “The spiritual life must therefore have first place in the programme of Families of consecrated life, in such a way that every Institute and community will be a school of true evangelical spirituality” (in AAS, 88 [1996], 469, in *L'Osservatore Romano*, English ed., April 3, 1996, supplement, 18).

⁶⁶ See HITE, “Admission of Candidates,” 166.

⁶⁷ See ANDRÉS, “Commentary on Religious Institutes (cc. 607-709),” 1760-1761. For more extensive reading in ongoing formation for religious, see also J. GIALLANZA, “Continuing Formation: Perspectives from *Vita consecrata*,” in *RfR*, 66 (1997), 468-477; S. RENDONA, “Growing in the Oblation Formation after the Novitiate,” in *Consecrated Life*, vol. 16, no. 1 (1991), 59-82; J. AUBRY, “Ongoing Formation,” in *The Way Supplement*, 41 (1981), 74-87; L. MEES, “Ongoing Formation for Mission,” in *UISG Bulletin*, no. 107 (1998), 40-44;

2 — *Canonical Principles Governing Formation during the Period of Temporary Vows in the 1983 Code of Canon Law*

Besides the programme and the manner of carrying it out, the formation of religious during temporary vows also includes a series of activities structured in conformity with its process and purpose. The whole process of this formation is programmed within a time frame with specific tasks to be accomplished by designated persons and with the desired outcome projected at its conclusion. This section treats the universal law which regulates the duration, the tasks of those charged with formation, the rights and obligations of those in temporary vows and the manner in which this formation is concluded.

2.1 — Duration

On the duration of the time of temporary vows, the universal law treats of its ordinary period, extension of the time and anticipation of profession. For the ordinary period of temporary vows, the universal law prescribes a duration of 3-6 years (c. 655) with a possible extension of three years (c. 657 § 2). The extension is an exception which must be motivated by a just reason which, in the judgment of the competent superior who is to admit, provides grounds for extension.⁶⁸ In other words, initial formation during temporary

R. EDENHOFER, "Some Principles for the Solution of the Problems in Sisters' Formation," in *Sisters Formation Bulletin*, vol. 2, no. 3 (1956), 5-7; P. EDWARDS, "Principles of Further Formation," in *The Way Supplement*, 32 (1977), 27-37; T.A. ESCAPALLADA, "Sentido de la formación permanente para la vida religiosa," in *Ciencia tomista*, 92 (2001), 441-466; K. O'ROURKE, "The New Instruction on Formation of Religious," in *CLSA Proceedings*, 31 (1969), 102-111; D. O'SHEA, "Formation in the Postmodern Age," in *RLR*, 39 (2000), 76-86; R. ROHR, "Religious Life and Formation: Same Thing?," in *RLR*, 43 (2004), 94-97; T.R. BENEDETO, "Formação permanente desafio à renovação vida religiosa," in *Direito e pastoral*, vol. 17, no. 46 (2003), 105-134; G. ATHOL, "Communal Perspectives of Formation," in *The Way Supplement*, 56 (1986), 110-115; E. ANN, "Apostolic Formation through the Curriculum," in *Sisters Formation Bulletin*, vol. 4, no. 3 (1958), 1-7; AQUINAS, "Education of Sisters in Extension Courses," 4-9; C. SERRAO, *Discernment of Religious Vocation: Formation towards Transformation*, Mysore, Dhyanaavana, 2004.

⁶⁸ Canon 657 § 2 uses "opportune time" as motivation for the extension of the period of temporary vows. This is for the best interest of the candidate and the institute to achieve efficacy. See ANDRÉS, "Commentary on Religious Institutes (cc. 607-709)," 1741. It is also a time which both the institute and the member in formation consider appropriate for making perpetual profession. Rosemary Smith gives some reasons which may justify an extension: minor doubt about the candidate's maturity on the part of the institute, the need for more apostolic experience, young age and the necessity for completing some aspects of the formation programme. See R. SMITH, "Commentary on Formation of Religious (cc. 659-661)," in *CLSA Comm2*, 826.

vows is to be concluded within six years. The Code empowers individual institutes to establish the structure of this duration, including the details of its length, evaluation procedures and the manner of renewals.⁶⁹ The anticipation of perpetual profession is mainly a provision for pastoral reasons.⁷⁰ The Code allows for up to three months of anticipation of profession according to canon 657 § 3, which creates an exception to canon 655. The Code does not mention the possibility of anticipation of renewal of vows; nevertheless, some authors hold that the same reasons for anticipating perpetual profession can be used for anticipating the renewal of vows.⁷¹

The rationale behind the prescription of a definite duration of time for temporary vows and the possible extension is to give the candidate ample time to have a lived experience in the institute. It is also to help the candidate gain the necessary maturity for perpetual profession and to give those in charge of formation enough time to assess it in view of lifelong commitment in the institute. This is what McDonough refers to as “responsible formation.”⁷² It is a balance of time which is, on the one hand, not so short as to limit the ability to realistically assess progress toward readiness for final incorporation, and, on the other hand, not unduly prolonged if positive hope for maturity is not foreseen.⁷³ Andrés adds that, if the decision to conclude the period of temporary profession is put off too long, this might create difficulties for the member in returning to secular life in the case of non-admission. He argues that, if after six years, the required maturity is not evident, it is doubtful that an additional three years will guarantee it.⁷⁴

2.2 — Role of Formators

The present Code does not explicitly specify the office of the director and teachers of those in temporary vows; however, their necessity and tasks are implied in canons 660 § 1 and 659 § 1. These canons, interpreted analogously in the context of canons 650-652 on the director of novices and

⁶⁹ Canons 463, 465 and 526 of the Eastern Code refer to temporary vows in orders and congregations for a time between three and six years, while monasteries can admit to perpetual profession after three years of novitiate.

⁷⁰ See E. McDONOUGH, “Renewal of Temporary Vows and Perpetual Vows,” in *RfR*, 60 (2001), 433.

⁷¹ See *ibid.*, 434; SMITH, “Commentary on Formation of Religious (cc. 659-661),” 824. See also *CIC/17*, c. 573 § 2 on the possibility of one month anticipation for temporary but not for perpetual vows.

⁷² McDONOUGH, “Renewal of Temporary Vows and Perpetual Vows,” 434.

⁷³ See *ibid.*

⁷⁴ See ANDRÉS, “Commentary on Religious Institutes (cc. 607-709),” 1739.

assistants, allow institutes, in accordance with their proper law, to establish an office of director of temporarily professed. Indeed, more clarity on the manner of designating the person to be appointed to this office, the qualities required and the roles of the director is provided in the subsequent post-conciliar documents of the Holy See on formation.⁷⁵

Besides the director, canons 660 and 661 on the content and pedagogy of formation of religious suggest the availability of qualified and competent teachers. Such teachers are to train religious through courses which lead to appropriate academic accreditations acquired in institutions outside the institute. However, in whatever manner or place such courses are undertaken, those in charge of formation are to ensure that the harmony of the elements of formation in accord with the purpose and nature of the institute is maintained.⁷⁶

2.3 — Rights and Obligations of Religious in Temporary Vows

Within the canonical tradition of the Church, the subject of rights and obligations is of great significance. Unlike in the secular legal system, whereby rights and obligations have their origin in law, in the canonical system, as E. McDonough explains, rights and obligations arise primarily – but not exclusively – from common mutual and reciprocal obligations, coupled with response to a personal experience of God’s initiative. Such a response entails certain consequences, which we refer to as obligations.⁷⁷

The 1983 Code has specified certain rights and obligations applicable to all the Christian faithful (cc. 208-223) by virtue of their baptismal consecration (c. 207) and of full communion with the Church (c. 205). Besides these common rights and obligations, the Code lists other rights and obligations for those Christian faithful who are clerics (cc. 273-289).

In canons 662-672, the Code has prescribed obligations and rights proper to religious, deriving from their consecration through religious profession. On the surface, as D.F. O’Connor remarks, these canons (with the exception of

⁷⁵ See *PI*, nos. 30-31, in *AAS*, 82 (1990), 492-493, in *Origins*, 19 (1989-1990), 686; *Attenta alla condizioni*, nos. 23-26, in *Enchiridion Vaticanum*, vol. 17, 1367-1371, in *CLD*, vol. 14, 618-620.

⁷⁶ For more reading on formation personnel, see C. BROWNING, “Practical Points for Directors of Young Religious,” in *Sisters Formation Bulletin*, vol. 4, no. 4 (1958), 8-14; F.G. MORRISEY, “Practical Points for Formation Directors in the New Code,” in *In-formation*, no. 92 (1986), 1-5; C. REGAN, “Integral Formation,” in *RLR*, 34 (1995), 345-351; K. WENZEN, *Turnover and Burnout among Vocation and Formation Directors: An Exploratory Survey*, Washington, DC, Centre for Applied Research in Apostolate, 1982.

⁷⁷ See McDONOUGH, “Understanding Obligations and Rights in Church Law,” in *RfR*, 49 (1990), 779.

canon 670) “do not specify any rights but only state exhortations and obligations.”⁷⁸ However, McDonough explains that the specific norms on rights and obligations of religious have to be understood from the perspective of the overall canonical system of the Church. This is in relation to juridical consequences, which arise from certain religious acts that are contractual in nature.⁷⁹

The norms dealing with the obligations of religious include the following of Christ as the supreme rule (c. 662), spiritual exercises (cc. 663-664), fraternal life in common and residence in a religious house (c. 665), prudent use of modern means of social communication (c. 666), practice of solitude (c. 667), observing the regulations on personal property (c. 668), wearing of religious garb or appropriate secular dress as a witness of consecration and poverty (c. 669) and obtaining appropriate permission from legitimate superiors before accepting duties and offices outside the institute (c. 671). Canon 672 specifies other obligations proper to clerics by which religious too are bound.⁸⁰ The reciprocal obligation of the institute to provide for its members all that is necessary to fulfill their vocation is prescribed in canon 670. Commenting on the canon, D.F. O'Connor points out that the text uses the word *must*, which implies that it is imperative for every institute, through its designated agents, to ensure that all the needs of members necessary for the fulfillment of their vocation are met. In this sense, the canon provides an umbrella combination of the rights of members stemming from the obligations placed on them.⁸¹

With regard to those in temporary vows, rights and obligations take a formative and probationary perspective. The obligations listed in canons 662-672 reinforce the demands of the various components and manner of formation specified in canons 659-661. Therefore, a correlation between the obligations listed for religious and the prescription on formation is evident. The obligation to continuous imitation of Christ and practice of spiritual exercises conforms to the spiritual and dogmatic aspects of formation specified in canon 660 § 1. In the context of probation, spiritual and dogmatic training is to lead the candidates to a genuine faithfulness to the spirituality and charism of the institute and a deeper union with God through prayer, solid sacramental life and love of Sacred Scripture. Spiritual training is also to foster development in virtue, a deeper understanding and appreciation of the evangelical counsels and the assimilation of what *PI*, no. 6 refers to as “all in which religious identity consists.”⁸²

⁷⁸ See O'CONNOR, *Witness and Service*, 51.

⁷⁹ See McDONOUGH, “Understanding Obligations and Rights in Church Law,” 782.

⁸⁰ See *ibid.*, “779-780.

⁸¹ See O'CONNOR, *Witness and Service*, 49.

⁸² *PI*, no. 6, in AAS, 82 (1990), 475, in *Origins*, 19 (1989-1990), 679.

The obligation of fraternal life in common in a religious house, prudence in use of social means of communication and the practice of solitude are all connected to the required maturity and unity of life which comes as a result of the harmonization of all the aspects of formation. This is to lead to a balanced and integrated life which provides a good basis for admission to perpetual commitment. The remaining obligations reinforce the apostolic formation that demands deeper ecclesial awareness and respect for the hierarchy. This is to be demonstrated by love of the institute's charism and apostolic zeal, so that members of a particular religious institute live and carry out the mission of the institute.⁸³

Other than the norms on rights and obligations applicable to all religious, the Code prescribes other regulations which are applicable exclusively to religious in temporary vows, deriving from the temporary juridical nature of their commitment. These include cessation or renunciation of personal property according to the nature of the institute (c. 688 § 1 and § 4), dismissal for even less grave reasons than those stipulated in the universal law determined in the proper law (c. 696 § 2), for illness contracted even after profession (c. 689 § 2) and the incapacity to transfer to another institute (c. 684 § 1). In the Eastern Code however, transfer of a temporarily professed religious is permissible (*CCEO*, c. 545 § 2).

The whole issue of granting passive and active voice to temporarily professed, although not prescribed in the Code, remains a matter of debate, as the current position of the Holy See remains non-affirmative. The same position applies to the question of whether the temporarily professed can hold the office of local superiors.⁸⁴

2.4 — Conclusion of the Period of Temporary Profession

The overall aim of temporary profession is to help the candidate acquire the necessary maturity for permanent profession. However, this outcome does not always occur. Thus, the Code provides three options for the

⁸³ See ANDRÉS, "Commentary on Religious Institutes (cc. 607-709)," 1765.

⁸⁴ CONGREGATION FOR RELIGIOUS AND FOR SECULAR INSTITUTES, Reply concerning Granting Passive Voice to Temporary Professed, January 17, 1970, in *CLD*, vol. 7, 526-527. The reply states (at 526): "[...] this Sacred Congregation does not believe that granting passive voice to sisters in temporary vows or promises would be a prudent experiment because of their lack of maturity among other reasons." See also *Id.*, "May the Temporarily Professed Be Granted Active and Passive Voice in the Election of Delegates to the General Chapter and May They Be Appointed Local Superiors?," in *Informaciones*, 1 (1976), 71-73.

conclusion of temporary vows: admission to renewal of vows, admission to perpetual profession, and definitive separation from an institute.

On admission to renewal of vows, the law requires that at the end of the period of profession, a member in temporary vows freely requests to renew the vows. The candidate may be admitted to do so if judged suitable by the competent superior. The rationale is, as R. Smith explains, that temporary vows is a time of continuing formation, and therefore, assessment for the required suitability is important at every juncture.⁸⁵ Smith adds that periodic assessment, which includes the question of expectations and goals, reviewed and evaluated with the candidate and all those charged with the task of formation, is important in helping both the member and the institute to assess the state of the vocation of the member at specified times. It also offers an opportunity for pointing out the areas in which further growth is needed, articulating desired outcomes within specific timelines.⁸⁶

The second option for the conclusion of temporary vows is admission to perpetual profession. The requirements for the validity of perpetual profession are specified in canons 656 §§ 3-5 and 658, but proper law may place additional requirements. The law demands that, at the end of temporary profession and at the free request of the member, the competent superior may admit the member to perpetual profession, having judged his or her suitability (c. 657 § 1). The judgment of suitability is based on the presumption that, throughout temporary vows, the member's training, direction, and evaluation have been ongoing. The proper law of each institute is to specify the manner of assessment, so that the decision is reached with maximum objectivity.⁸⁷ Smith suggests that the proper law prescribe a period of intense immediate preparation which includes some form of spiritual exercises, for instance, the eight- or thirty-day retreat before making perpetual profession mentioned in *Renovationis causam*, no. 9.⁸⁸

The last option for the conclusion of temporary vows is definitive separation from the institute, which can be voluntary or involuntary. According to canon 688, voluntary separation can occur during or at the end of temporary vows. If it happens before the expiry of temporary vows, the provisions of canon 688 § 2 are to be followed. An indult of departure is to be granted by internal authority. For validity, the indult must be confirmed by the diocesan Bishop of the house of assignment for institutes of diocesan right and

⁸⁵ SMITH, "Commentary on Formation of Religious (cc. 659-661)," 823.

⁸⁶ See *ibid.*

⁸⁷ See *ibid.*, 824.

⁸⁸ *Ibid.*

autonomous monasteries mentioned in canon 615. This confirmation is not required for members of institutes of pontifical right.⁸⁹

For involuntary departure, universal law foresees either exclusion from making further profession at the expiry of the time of profession (c. 689 § 1) or dismissal during temporary vows (c. 696 § 1). Given the tedious process of dismissal, scholars like S. Holland recommend that for temporarily professed members, the better option is to wait for the expiry of the temporary vows.⁹⁰

Exclusion from further profession or non-admission to perpetual profession is the second manner of involuntary departure. Elio Gambari explains that exclusion, which is a juridical act of competent authority, is merely the refusal of admission to further profession, whether the latter is temporary or definitive.⁹¹ Though not qualified as dismissal,⁹² it amounts to definitive separation from the institute. Therefore, the authority to exclude belongs to the competent major superior, after consulting his or her council.⁹³ The motivation must be based on a just cause which, as McDonough explains, “must be proportionate to the matter at hand and not merely insignificant reasons or personal preferences.”⁹⁴ Elio Gambari adds that, in judging the sufficiency of the just cause, the common good of the institute is to be considered above that of the individual.⁹⁵ Since exclusion is not a penalty, it

⁸⁹ See E. McDONOUGH, “Renewal of Temporary Vows and Perpetual Vows,” in *RfR*, 60 (2001), 436.

⁹⁰ See S.L. HOLLAND, “Article 2: Departure from an Institute (cc. 686-693),” in *CLSA Comm2*, 867.

⁹¹ See E. GAMBARI, “The Proposed Canons on the Consecrated Life Explained: IV,” in *RfR*, 39 (1979), 888.

⁹² See VOEGTLE, *Canonical Reasons for the Rejection of Candidates*, 84, where he distinguishes dismissal from exclusion. He explains that dismissal refers to being definitively cut off from the community and being relieved of the obligations while one is still attached to the institute by bond of profession, while exclusion is an act of the competent superior to prevent one whose bond has expired from renewing the link with the community.

⁹³ See GAMBARI, “The Proposed Canons on the Consecrated Life Explained: IV,” 888.

⁹⁴ See *ibid.*, 859; E. McDONOUGH, “Exclusion from Profession at the Expiration of Temporary Vows,” 543.

⁹⁵ Gambari offers some examples of reasons for exclusion from making further profession: 1) lack of religious spirit, observable in an absence of a firm and constant vocation to consecrated life, coupled with serious doubts as to the general suitability for religious life; 2) inability to carry the apostolic works of the institute arising from a lack of general ability, intelligence, or application, from a defect of prudent judgment, laziness, negligence, or from culpable or inculpable causes; 3) lack of the ability for spiritual progress; 4) lack of community spirit causing serious discord in the community; and 5) and when it is foreseen that the subject will be more harmful than useful in the institute. See GAMBARI, “The Proposed Canons on the Consecrated Life Explained: IV,” 888. Hite explains that justification is to

qualifies as legitimate departure with possible readmission, according to c. 690. The Code does not provide a special process for exclusion, but by reason of charity and equity envisioned in canon 702, reasons for such exclusion can be presented to the member in summary form and clearly stated with a consideration of a possible readmission to the institute if necessary.

On the second manner of involuntary separation, canon 689 § 2 treats the controversial issue of the non-admission to profession due to illness which renders a member incapable of leading the life of the institute.⁹⁶ The Code presents a reformulation of the same norm in canon 637 of the 1917 Code, which disqualified one from admission to profession due to illness which was fraudulently concealed or hidden by the candidate before profession. The present Code departs from the motivation of concealment of illness as grounds for non-admission. Such a concealment is a form of fraud act which consequently, renders any subsequent act invalid, according to canon 643 § 1, 4°.

Therefore, illness disqualifies one from admission to profession only under four conditions: 1) the illness exists, even if contracted after profession; 2) more than one expert confirms the illness renders the member unsuitable to lead the life of the institute;⁹⁷ 3) the illness was not contracted due to the negligence of the institute or because of work performed in the institute; and 4) the competent major superior has heard the council before

be based on the review process. The reasons for excluding a member from further profession are to stem from the structured criteria of assessment of which the member has knowledge. Such criteria can be stipulated in the proper law. See HITE, "Admission of Candidates," 159. Cf. also *Communicationes*, 13 (1981), 335.

⁹⁶ Gambari considers ill-health to involve serious harm. He argues that "a slight deficiency in physical health, for example, would not in itself exclude suitability for the consecrated life" (GAMBARI, "The Proposed Canons on the Consecrated Life Explained: IV," 889).

⁹⁷ These experts are those specified in c. 1574, namely those who because of their expertise are to be consulted as a requirement of the law, whenever there is need "to establish some fact or to discern the true nature of some matter." The notion of expert in canon law, as K.E. BOCCAFOLA points out, is broad and covers different fields of specialization. See K.E. BOCCAFOLA, "Commentary on Experts," in *Exegetical Comm*, vol. 4/2, 1328-1331. In the case of c. 689 § 2, the preferable experts would be those who understand and respect religious life and are suited to evaluate potential candidates for membership. See R. SMITH, "Article 1: Admission to the Novitiate (cc. 641-645)," in *CLSA Comm*2, 807. Jesus Torres explains that the lack of suitability referred to is related to the kind of life one is to lead in a particular institute and not necessarily regarding religious life in general. However, he points out the dilemma in ascertaining this "lack of suitability to lead the life in the institute" by the experts, as they are not competent in judging the incompatibility of illness with religious life, a decision which rests with the competent authority of the institute. See J. TORRES, "Dispensation from Vows," in *Consecrated Life*, vol. 18, no. 1 (1995), 89.

making the decision of non-admission to profession.⁹⁸ The member may lodge hierarchical recourse if he or she believes the decision to exclude from further profession to be unreasonable or unjustified. However, Gambari notes that recourse to the Holy See against exclusion has little hope of success, except in the case of a clearly invalid exclusion, since the Holy See is conscious that universal law empowers competent superiors to judge the suitability of a member for profession.⁹⁹

Another matter specified in canon 689 § 3 (with a parallel in *CCEO*, c. 547) concerns the juridical status of a member who becomes insane during temporary vows. While the 1917 Code had a *lacuna* on the issue, the 1983 Code proceeds with a spirit of charity and justice: the member remains in the institute and is taken care of indefinitely, based on their incapacity to place a juridical act according to canon 124.¹⁰⁰ Some authors suggest that the possibility for the member to be cared for by his/her family could be explored but such is not to replace the responsibility of the institute.¹⁰¹

3 — Documents on Formation after the 1983 Code

The section treats the post-conciliar documents which elaborate on the norms of formation of religious. They are the Directives on Formation in Religious Institutes *Potissimum institutioni*, 1990, *Instrumentum laboris* of

⁹⁸ CONGREGATION FOR INSTITUTES OF CONSECRATED LIFE AND SOCIETIES OF APOSTOLIC LIFE, Decree on Confession for Religious *Dum canonicarum*, December 8, 1970, in AAS, 63 (1971), 318-319, English translation in *CLD*, vol. 7, 533. See also J. TORRES, "Dispensation from Vows," 86-87. The subject of assessment of candidates for membership in religious institutes continues to be of interest to many authors. For further reading, see for instance, W.J. COVILLE et al., *Assessment of Candidates for Religious Life: Basic Psychological Issues and Procedures*, Washington, DC, Centre for Applied Research in the Apostolate, 1968; T.H. MAMINIMINI, *Maturity and Its Assessment for Admission of Candidates to Religious Life, with Particular Reference to Institutes in Zimbabwe*, JCD thesis, Ottawa, Saint Paul University, 2000; L. GENDRON, "Some Moral Problems Connected with Psychological Testing of Religious, Seminarians and Candidates," in *Linacre Quarterly*, 46 (1979), 167-177; R. HILL, "Screening Candidates: Need to Know," in *RJR*, 45 (1986), 458-462; C.C. EZEANI, "Religious Formation and the Integral Psychological Development of Candidates," in *RJR*, 70 (2011), 226-275; T.A. ESCAPALLADA, "Sentido de la formación permanente para la vida religiosa," in *Ciencia tomista*, 92 (2001), 441-466; F.G. MORRISEY, "Issues of Confidentiality in Religious Life," in *Bulletin on Issues of Religious Life*, 4 (1988), 1-10.

⁹⁹ See GAMBARI, "The Proposed Canons on the Consecrated Life Explained: IV," 890.

¹⁰⁰ CONGREGATION FOR RELIGIOUS, reply *De religiosis professis votorum temporarium in amenitiam incidentibus*, February 5, 1928, in AAS, 17 (1925), 107.

¹⁰¹ See HITE, "Admission of Candidates," 241.

the 1994 Synod of Bishops on Consecrated Life, Post-Synodal Apostolic Exhortation *Vita consecrata*, 1996, the Instruction on Inter-Institute Collaboration for Formation *Attenta alla condizioni*, 1998 and the Instruction *Starting Afresh from Christ*, 2002.

3.1 — Directives on Formation in Religious Institutes *Potissimum institutioni*, 1990

The document Directives on Religious Formation was issued on February 1990 after a long history of drafting. During the Second Vatican Council, the Congregation for Religious and Secular Institutes issued an instruction, *Renovationis causam*, which reordered the norms on formation in the 1917 Code. This was followed by a process of consultation with religious institutes on the topic of formation. The fruit of this consultation, completed in 1973, was a new formation document. Its publication was postponed to allow for the revision of the Code of Canon Law. However, the promulgation of the new Code necessitated a second round of consultation on formation, which was conducted between 1986 and 1989. Finally, the instruction *Potissimum institutioni*, directed specifically to formation of members of religious institutes, appeared in 1990.¹⁰² Published as an instruction, it was intended by the Congregation, according to canon 34, to clarify and give further directives on the application of existing norms.

The instruction has an introduction, five parts and a brief conclusion: introduction (nos. 1-5); followed by chapters related to religious consecration (nos. 6-18); common aspects of formation (nos. 19-41); stages of formation (nos. 42-71); formation in strictly contemplative institutes (nos. 72-84); five practical matters in current formation (no. 86) and a brief conclusion (no. 110).

The introduction begins by explaining the purpose of formation of religious, affirming that formation has been a constant concern for the Church since Vatican II and giving examples of documents which have addressed the topic (nos. 1-2). The document then specifies its recipients as religious institutes (no. 5) and states its purpose, “to help institutes [...] to elaborate their own programs of formation (*ratio*), as they are obliged to do by the general law of the Church. On the other hand, men and women religious

¹⁰² CONGREGATION FOR INSTITUTES OF CONSECRATED LIFE AND SOCIETIES OF APOSTOLIC LIFE, Directives on Formation in Religious Institutes *Potissimum institutioni*, February 2, 1990, in AAS, 82 (1990), 470-532, English translation in *Origins*, 19 (1989-1990), 677, 679-699.

have the right to know the position of the Holy See on the present problems of formation and the solutions which it suggests for resolving them” (no. 4).

The first part of the document addresses the topic of religious consecration and formation (nos. 6-18). It reaffirms that a vocation to religious life fuses the mysterious dynamic of divine call and of human response (nos. 8-9). The act of profession consecrates the person to God and simultaneously incorporates that person into a particular religious institute (no. 10). Consecration also leads to the living of evangelical counsels in a probationary manner for those in formation. The document outlines specific aspects to be addressed in formation pedagogy regarding chastity (no. 13), poverty (no. 14), and obedience (no. 15). The evangelical counsels are to be practiced according to the purpose and character of each institute but in the ecclesial context. Formation is to lead to unity of life so that, there is no dichotomy between “[the] ends of religious life and the ends of the institute, religious life itself and the apostolic activities, religious consecration to God and mission in the world” (nos. 17-18).

The second part of the instruction, entitled Common Aspects of Formation, has four subdivisions: a) The Agents and Environment of Formation; b) The Human and Christian Dimension of Formation; c) Ascetism; and d) Sexuality and Formation (nos. 19-41). The agents and environment of formation are listed as the Holy Spirit, the Virgin Mary, the Church (and “the sense of the Church”), the community, the religious themselves and, finally, those in charge of formation, that is, the formators and superiors (nos. 19-35). The document emphasizes the role of the Holy Spirit in discerning the will of God in formation (no. 19) and of Mary, Mother of God, as a model of total surrender (no. 20). As religious life pertains to the life and holiness of the Church, the instruction recommends formation which promotes an organic sense of ecclesial communion. This is to be characterized by love and respect for the pastors of souls, taking the Church as the *locus* where religious persons are received, incorporated and nourished as part of the body, the Church (nos. 21-25).

The instruction perceives formation as a corporate work of the entire religious family, having its *locus* in the community. The religious community, bonded together in fraternal love, a common spirituality and charism, a corporate apostolate and identity, characterized with a spiritual atmosphere, an austerity of life, and apostolic enthusiasm provides the formative environment for new members and thus fosters formation (nos. 26-29). Besides the community, the candidates also have the duty to contribute to their own formation as active participants, while those in charge of formation have the duty to assist them to discern the authenticity of their vocation and further their dialogue with God (nos. 30-31).

The document highlights the significance of human development and Christian formation necessary for the required maturity for religious life (no. 33), which must be ascertained by competent superiors and formation personnel at the time of admission. The instruction stresses the importance of integral formation, which synthesizes the moral, physical and spiritual dimensions of the personality of the candidate (nos. 33-34). It highlights the primacy of spiritual formation (no. 35) and the significance of asceticism in the life of religious. Formation is also to include orientation towards the appropriate practice of asceticism as the means of counteracting the secular values and of acquiring virtues (no. 38). The document recognizes the challenge of the distorted knowledge and understanding young people of today have of sexuality. Therefore, formation therefore is to promote the correct understanding of human sexuality, so candidates gain deeper knowledge of their sexuality and its specific role in the plan of God (nos. 39-40). It urges imitation of Mary, Mother of God as model of the feminine religious life (no. 41).

The third part of the document deals with the stages of formation and outlines the purpose and structure of each one (nos. 42-53). It explains that the pre-novitiate is to ensure proper preparation of the candidate before novitiate. The material for formation and the pedagogy for this stage are based on the indicators of maturity required in accordance with the proper law of individual institutes (nos. 42-43). It should be clear that, at this stage, candidates are not members of the institute (no. 44). The instruction explains the purpose of the novitiate as prescribed in canon 646, with emphasis on the duty of the individual institutes in drawing up the *ratio* of formation configured to the individual needs and the pace of growth (nos. 52-53).

Formation during temporary profession is to be a continuation of what is prescribed in canon 659 §§ 1-2. It should aim at real progress in unity and harmony in the life of the candidate, in view of perpetual commitment and for apostolic effectiveness according to the purpose of the institute and the needs of the Church. Formation is to be organized under the direction of a specific professed religious designated for this task and, preferably, in a community setup (nos. 60-65). Continuous formation after perpetual profession ought to be directed towards the wholeness of the person in relation to the spiritual mission of religious life. This is to include the deepening of one's spiritual life within the institute, pastoral collaboration with others, doctrinal and professional updating and an increased understanding of the community's charism (nos. 66-70).

In contemplative institutes, *Potissimum institutioni* recommends formation which includes human and religious culture, Sacred Scripture, *lectio divina* and liturgy, with emphasis on a healthy and meaningful practice of

asceticism. The structure of this formation is to be flexible in its successive stages. The document recommends an organized collaboration in formation initiatives among monasteries of the same order or federation, without prejudice to the formation programme of each institute, drawn according to the norms of universal and particular law (nos. 71-85).

In a section entitled “Actual Questions concerning Religious Formation,” the instruction highlights some areas of concern: the effects of modernity and secular ideologies on youth and their apparent lack of theological foundation, dangers of divided loyalty to different spiritualities which may arise from membership in ecclesial movements, and the impact of culture on religious formation. The instruction reaffirms the rightful autonomy of religious institutes with regard to the bishops’ role as authentic teachers and witnesses of the faith (nos. 95-96), while it encourages cooperation and collaboration concerning initiatives for formation at the parish, diocese and inter-institutional levels. It recommends a *Ratio fundamentalis* for each institute, harmonized with the universal law for religious candidates for orders and offers a reminder that formation work is an ecclesial responsibility (nos. 97-109). The instruction ends by urging a Marian orientation for all religious (no. 110).

In general, *Potissimum institutioni* addresses the subject of formation from the perspective of the ongoing renewal process of religious life since Vatican II and the challenges which have come with it. This is in the context of the rapid social changes in the world of which candidates are a product and the new realities facing religious life, including diminishment and lack of vocations in some parts of the world.

Specifically with regard to formation during temporary vows, the instruction is conscious of the minimal norms prescribed in the Code. Therefore, it treats the period of temporary vows with detailed directives.¹⁰³ The instruction dedicates nos. 59-60 to this stage of formation. It re-affirms the prescription of the Church (c. 659 § 1) on its purpose as preparing the candidate toward integration of life. This entails deepening of religious identity and gaining the necessary ability to meet the requirements and expectations of the contemporary world, coupled with spiritual and apostolic enthusiasm. Since the aim of formation during temporary vows is striving for the unity of life, the programme, presented in the context of community life, is to be adapted to the needs of individuals, taking into account the circumstances

¹⁰³ Elizabeth McDonough states: “Since the norms of the Code regarding formation are thorough but minimal, and since the formation of religious is foundational for the whole of one’s religious life, this recent instruction provides a helpful explication of this indispensable element of a religious vocation” (E. McDONOUGH “Directives on Religious Formation: *Potissimum Institutioni*,” in *R/R*, 54 [1995], 148).

related to place and time and is to lead to the harmonization of different aspects of formation. *Potissimum institutioni* focuses on the person of the candidate who comes from the contemporary world and culture. This is in view of how best the candidates can be formed to live religious life more fully and fulfill their mission in the particular institute.

Potissimum institutioni, by its pedagogical and systematic presentation of the directives on all phases of formation of religious, is a valuable resource material for institutes. It expresses the concern and dedication of the Church to quality formation of religious, while it situates formation in the ecclesial context and presents it as a communal task of the ecclesial community.¹⁰⁴ It offers a candidate-oriented pedagogy for formation which responds to the formation needs and challenges of a new generation.¹⁰⁵ Sante Bisignano argues that, even though *Potissimum institutioni* does not provide all the answers to the challenges facing formation, it remains a valuable instrument for the journey of formation.¹⁰⁶ It sums up the most significant experiences of formation and offers criteria for their evaluation in the process of integral formation.¹⁰⁷ Vincente Kiaziku concludes that *Potissimum institutioni* is the first document to tackle in a complete and systematic manner the theme of formation of religious life.¹⁰⁸

3.2 — *Instrumentum laboris* of the 1994 Synod of Bishops on Consecrated Life

The *Instrumentum laboris* for the Ninth General Ordinary Assembly of the Synod of Bishops, issued on 20 June 1994,¹⁰⁹ was the fruit of worldwide consultation on the synodal topic,¹¹⁰ following the release of the *Lineamenta*

¹⁰⁴ Ibid.

¹⁰⁵ S. BISIGNANO, "A New Way of Talking about Formation," in *Consecrated Life*, vol. 16, no. 1 (1991), 4.

¹⁰⁶ Ibid., 12.

¹⁰⁷ Ibid., 9.

¹⁰⁸ C.V. KIAZIKU, *Consecrated Life in Bantu Africa*, Nairobi, St. Paul Publications – Africa, 2007, 186.

¹⁰⁹ SYNOD OF BISHOPS, THE 9TH GENERAL ORDINARY ASSEMBLY, *De vita consecrata deque eius munere in Ecclesia et in mundo: instrumentum laboris*, Libreria editrice Vaticana, 1992, English translation in *Origins*, 24 (1994-1995), 97, 99-138.

¹¹⁰ See R. McDERMOTT, "The Fruits of Consultation: The 1994 Synod's *Instrumentum Laboris*," in *R/R*, 54 (1995), 180. Before the conclusion of the Eighth Ordinary General Assembly of the Synod of Bishops, the Synod Fathers were invited to make suggestions on a topic to be treated at the next general assembly. In making their suggestions, the bishops were asked to keep in mind the following general criteria: (1) that the topic have a universal character; (2) that the topic have a contemporary character and a certain urgency; (3) that the topic have a pastoral

on 20 November 1992.¹¹¹ Indeed, the *Lineamenta* provoked severe criticisms,¹¹² and the ensuing reworking of the document contributed to a superior *Instrumentum laboris*.

The *Instrumentum laboris* is divided into six parts, namely the introduction, four chapters and the conclusion. The introduction begins by referring to the celebration of the synod on the consecrated life as a time that the entire Church was called upon to listen to the needs and desires of consecrated life and to discern how best it can respond, with its resources of spirituality and charism, to the needs and expectations of the contemporary world (no. 1). The document acknowledges with gratitude the active participation of the entire Church in the preparation of the Synod, reflected in the many initiatives of reflection, prayer and study, the quality and quantity of official responses from bishops from all over the world and the interest shown by consecrated persons themselves, seen in the responses sent through their superiors.¹¹³ It continues by appreciating the wide variety and different forms

focus and application, as well as a firm doctrinal basis; and (4) that treatment of the topic be feasible. The general consultation process revealed a remarkable convergence of ideas, indicating a preference for the topic of consecrated life. See P.J. SCHOTTE, "The Consecrated Life in Church and World," in *R/R*, 53 (1994), 35-36. Schotte provides the following list of reasons for choosing consecrated life as the synodal topic: 1) the necessity to reaffirm the true nature and significance of consecrated life in the Church and in the world today; 2) the flourishing of vocations in some parts of the world and the crisis of vocations in others, which calls for a thorough examination of consecrated life; 3) the need to review the renewal process proposed by Vatican II, especially the challenges which have come with it; 4) the need for further guidelines on collaboration between bishops and religious; 5) the desire for evaluation and proper guidance on the emerging forms of consecrated life; 6) the need to evaluate certain questionable models of community life adapted by some religious institutes; 7) the desire for clarity on the prophetic meaning of consecrated life amidst the circumstances of the postmodern society characterized by secularization, cultural crisis and the decline in moral values; 8) the wish for clarity on the prophetic character of consecrated life within the context of modern human society and culture; and 9) the concern of religious congregations and bishops to seek the proper pastoral approach in situations where institutes have abandoned their apostolic works. See *ibid.*, 36-37.

¹¹¹ SYNOD OF BISHOPS, THE 9TH GENERAL ORDINARY ASSEMBLY, *De vita consecrata deque eius munere in Ecclesia et in mundo: lineamenta*, Libreria editrice Vaticana, 1992, English translation in *Origins*, 22 (1992-1993), 433, 435-454.

¹¹² Critics of the *Lineamenta* viewed it as being too judgmental on the failures of consecrated life during the period of renewal and adaptation. Secondly, the document failed to present the essential elements of consecrated life as a guide for those involved in the consultation. Lastly, it advocated for total submission to bishops instead of promoting dialogue and cooperation. See McDERMOTT, "The Fruits of Consultation," 180-189.

¹¹³ Sean Fagan explains that the *Instrumentum laboris* expressed the fruit of the input from consecrated persons as people who are actually living the life. The material for discussion presented in the *Instrumentum laboris* closely reflected the issues that consecrated persons

of consecrated life. It responds to the question concerning the ambiguity of the meaning and limits of the term “consecrated life” by specifying its various forms and their distinguishing elements. Lastly, it presents the plan of the document (nos. 2-7).

The first chapter, which is divided into four parts, treats the topic of consecrated life today. Part one presents the theological, spiritual and pastoral reality of consecrated life. It recognizes the diverse forms of consecrated life, which are incarnated in persons, spiritualities and apostolates.

Part two recognizes the negative impact of the rapid social and technological changes on consecrated life, its identity and mission in the world. Part three presents the unique challenges facing consecrated life as a result of diverse cultural and geographical realities. These challenges call for spiritual renewal in the light of the gospel and discerning new ways of apostolic endeavours. Part four presents the various forms of consecrated life and their unique challenges. The document recognizes the presence and significance of new forms of evangelical communities and the possibilities of discerning new forms of consecrated life (nos. 8-40).

The second chapter of the document treats the topic of consecrated life in the perspective of the mystery of Christ and of the Church, in the context of the ecclesiology of communion. It begins by stating that consecrated persons witness to ecclesial communion through their diverse founding charisms, which, even though translated into varied forms of community life and apostolates, all fulfill the one mission (nos. 41-54).

The third chapter, which continues with the theme of communion, situates consecrated life in the context of ecclesial communion. Consecrated persons, being part of the ecclesial communion, are called upon to foster this communion by building authentic relations through communication and collaboration among themselves, with the hierarchy and the laity. The document emphasizes the positive results of dialogue, mutual relations, collaboration, and cooperation. The bishops on their part, are to uphold the autonomy of the religious institutes, preserve consecrated life, and coordinate apostolic endeavours of religious, mindful of the needs of the particular Church in the context of the organic communion (nos. 55-84).

The fourth chapter discusses consecrated life in the Church’s mission in view of the challenges and difficulties facing it and discernment of new ways of responding to the new realities. In view of present day challenges, consecrated persons are invited to greater spiritual vigour, a renewed apostolic

had proposed to be discussed at the Synod. See S. FAGAN, “Preparing for the Synod: The *Instrumentum laboris*,” in *RfR*, 33 (1994), 259.

vitality and greater commitment to appropriate formation and to vocation promotion. It stresses careful selection of candidates and formation which prepares candidates for the circumstances of the present day (nos. 56-89).

In view of ongoing formation, *Instrumentum laboris* recommends a *Ratio institutionis* for each institute, that is, a formation program which offers a more intense intellectual, philosophical and cultural formation in view of effective evangelization work. Formation is to pay attention to the background of the candidate, with emphasis on his or her maturity, present day circumstances and the needs of the Church. Such formation must offer a strong pedagogy of faith, founded on the word of God. It should be integral, progressive and adapted to the different stages of religious life (no. 90). These recommendations on ongoing formation appear in a brief form in the *Instrumentum laboris* but the subsequent post-synodal apostolic exhortation accords them more attention.¹¹⁴

3.3 — Post-Synodal Apostolic Exhortation *Vita consecrata*, 1996

The Post-Synodal apostolic exhortation *Vita consecrata*, signed on March 26, 1996 by John Paul II, was the final stage of the process of the Ninth General Assembly of the Synod of Bishops.¹¹⁵ This document, as McDermott

¹¹⁴ While the *Instrumentum laboris* speaks of ongoing formation as “enduring dynamism” (no. 92), *Vita consecrata* refers to it as “a constant search for faithfulness” (VC, no. 70, in AAS, 88 [1996], 444-446, in *L'Osservatore Romano*, English ed., April 3, 1996, supplement, 13). The *Instrumentum laboris* advocates for continuous formation in various phases of life of consecrated persons but does not specify these phases. *Vita consecrata* identifies these phases and explains their necessity and specifications in detail (VC, no. 71, in AAS, 88 [1996], 446-447, in *L'Osservatore romano*, English ed., April 3, 1996, supplement, 13). Both the *Instrumentum laboris* and *Vita consecrata* recognize formation of the formators as a priority. While the *Instrumentum laboris* speaks only of support and formation of formators (no. 92), *Vita consecrata* provides details on the required qualities, the manner of training, the type of institutions, and the kind of environment in which formation personnel are to be trained (VC, no. 66, in AAS, 88 [1996], 441-442, in *L'Osservatore Romano*, English ed., April 3, 1996, supplement, 12).

¹¹⁵ The Synod process can be divided into four great moments: the *Lineamenta*, the *Instrumentum laboris*, the Synodal assembly and the post-synodal document. After the Holy Father's choice of topic, a scheduled meeting comprising the council of the general secretariat, the secretary of the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life and representatives from the various groups associated with consecrated life took place. The observations resulting from this meeting were discussed and developed in subsequent council meetings, and, with the help of theologians, the text of the *Lineamenta* was drafted and studied, before the definitive text was submitted to the Holy Father, who accepted the topic. After further consultation, the council of the synod released the *Instrumentum laboris* for the Synod on 20 June 1994. After discussions on the synodal floor, 55 propositions were

remarks, is the fruit of the consultative process which followed the Synod's *Lineamenta*. It included the contributions of the bishops, other participants from around the world and those of the actual synod assembly.¹¹⁶ *Vita consecrata*, as some authors point out, completes the trilogy of apostolic exhortations¹¹⁷ on the distinctive features of the states of life in Church.¹¹⁸ It was also referred to as the Synod which provoked the greatest response and interest from the entire Church and the Holy Father.¹¹⁹

The document is divided into five parts, namely an introduction (nos. 1-13) and three chapters entitled *Confessio Trinitatis* (nos. 14-70), *Signum fraternitas*

presented to the Pope who, after studying them, issued the post-synodal apostolic exhortation *Vita consecrata* on March 26, 1996. See SCHOTTE, "The Consecrated Life in Church and World," 35. The Pope, on the opening of the 1994 Synod of Bishops, stated that the synod on consecrated life was to be the *kairos* moment for the integration of the conciliar texts. See JOHN PAUL II, "The Start of the 1994 Synod of Bishops," in *Origins*, 24 (1994-1995), 307. Jesús Castellano concurs when he remarks that *Vita consecrata* "mirrors the continuity of the practical guidelines of *Perfectae caritatis*" (J. CASTELLANO, "*Lumen gentium* – *Perfectae caritatis* – *Vita consecrata*: Dynamic Accord and Innovation in Three Texts of the Magisterium on Consecrated Life," in *Consecrated Life*, vol. 22, no. 1 [2000], 164).

¹¹⁶ R. McDERMOTT, "*Vita consecrata*: Vocation for the Third Millennium," in *RfR*, 55 (1996), 454-455.

¹¹⁷ "The apostolic exhortations which have their origin in the Synod of bishops have the addition of the word 'Post-Synodal.' As papal documents, they are the fruits of the gathering of bishops of the entire Church together with their head, the successor of Peter, where they discuss common pastoral problems, on matters of morals and faith and strengthen the ecclesiastical unity in the care of the universal Church" (SCHOTTE, "The Consecrated Life in Church and World," 35). See also E. McDONOUGH, "The Synod on Consecrated Life," in *RfR*, 52 (1993), 620. For an extensive study on the post-synodal apostolic exhortations of John Paul II, see M. MILLER (ed.), *The Post-Synodal Exhortations of John Paul II*, Huntington, IN, Our Sunday Visitor, 1998.

¹¹⁸ See JOHN PAUL II, Post-synodal Apostolic Exhortation on the Formation of Priests in the Circumstances of the Present Day *Pastores dabo vobis*, March 25, 1992, in AAS, 84 (1992), 657-803, English translation in *Origins*, 21 (1992), 717, 719-759. The Exhortation, addressed to both the clergy and the lay faithful of the Catholic Church, concerns the formation of priests in the present day. On the laity, see Id., Post-synodal Apostolic Exhortation on the Vocation and the Mission of the Lay Faithful in the Church and in the World *Christifideles laici*, December 30, 1988, in AAS, 81 (1989), 393-521, English translation *The Lay Members of Christ's Faithful People*, Boston, St. Paul Books and Media, 1989. With this Exhortation, the Holy Father intended to urge and promote a deeper awareness among all the faithful of the gift and responsibility they share, both as a group and as individuals, in the communion and mission of the Church.

¹¹⁹ Michael Miller remarks that "[...] the Holy Father followed all the events closely. He made a point of being at the meetings. Moreover, during and after the Synod, he delivered a number of systematic talks on consecrated life" (MILLER [ed.], *The Post-Synodal Exhortations of John Paul II*, 617).

(nos. 41-71), *Servitium caritatis* (nos. 72-103) and a conclusion (nos. 104-112). The exhortation presents a comprehensive pastoral and positive overview and a solid theological description of life consecrated by the profession of evangelical counsels.

The exhortation begins with a description of consecrated life by its Christological dimension and appreciates the gift of consecrated persons in the Church. The document recognizes the five forms of consecrated life and their spiritual and apostolic significance. The exhortation encourages all members of the faithful to appreciate the gift of consecrated life, and it urges consecrated persons to remain faithful in the midst of the challenges they face in today's world.

The theme *Confessio Trinitatis* (nos. 14-40), demonstrates the link between consecrated life and the mystery of Christ and of the Trinity. By the profession and the living of the evangelical counsels, consecrated persons imitate Christ and witness to the Trinitarian nature of Christian life, to a distinct and a special path to holiness, and to the eschatological reality in the Church.

The second theme, *Signum fraternitatis* (nos. 41-71), treats consecrated life in the context of ecclesial communion. Consecrated life manifests fraternal communion in imitation of Christ's life and in the model of the Trinitarian unity. This communion finds its expression in fraternal life in common, fidelity to spiritual life and to the shared charism and apostolates. Communion is to extend to the entire ecclesial community, demonstrated by greater cooperation and collaboration with the hierarchy at all levels, in areas of formation, pastoral planning and apostolic initiatives so that witness to ecclesial communion is truly upheld.

Likewise, formation programs for candidates should aim at achieving the integration of human, communal, apostolic, cultural and professional dimensions of the person. The Holy Father recognizes the significance of the contribution of consecrated women in the Church. He recommends further exploration of ways of greater involvement and participation in the life and mission of the Church and appropriate professional, theological and pastoral formation adapted to modern needs

The last theme, *Servitium caritatis* (nos. 72-103), refers to life consecrated by profession of the evangelical counsels and service as a sign of God's love to the world. Consecrated persons continue the mission of Christ through their personal life, their charisms and in apostolic works in which they engage in evangelization, ecumenical and interreligious dialogue, inculturation, the preferential option for the poor, the promotion of justice and in the field of education.

Vita consecrata does not separate the two aspects of post-novitiate formation, that is, formation during temporary vows and that which continues after perpetual profession. It simply refers to ongoing formation, which is reaffirmed as an intrinsic requirement for all consecrated persons. This is a reminder that all consecrated persons are in formation throughout their lives as a means of a renewed sense of fidelity and of a refreshed approach to every dimension of consecrated life.¹²⁰ As J. Giallanza points out, “formation in religious life is, of its nature, a progressive thing that persists to the very end of one’s life.”¹²¹ The document presents ongoing formation as a means at the disposal of consecrated persons to discover their own identity as, precisely, consecrated persons called to fulfill the mission of Christ in the world.¹²² Therefore, it presents formation as a lifelong search for faithfulness and preparation for effective engagement with the world (nos. 69-70).

In summary, the exhortation recognizes formation as a lifelong process. It recommends a *ratio institutionis* for every institute which specifies a precise and systematic description of its plan for continuing formation. It highlights the different phases of consecrated life, which require formation proper to them. It specifies the various dimensions of ongoing formation, all of which are to be harmonized in the charism of the institute aimed at unity of life and lifelong faithfulness to religious consecration.¹²³

¹²⁰ Ibid., 471.

¹²¹ Ibid., 470.

¹²² GIALLANZA, “Continuing Formation,” 469.

¹²³ For a more extensive study on the Synod, see J. SWEENEY, “Consecrated Life: The Synod and Theology,” in *RLR*, 34 (1995), 75-85; E. STARKEN, “Reflections on the Synod I,” in *RLR*, 34 (1995), 86-90; E. STARKEN et al., “Religious Address the Synod,” in *RLR*, 33 (1994), 334-361; E. ROSANA, “The Synod’s Discussion of the Consecrated Life of Women,” in *Consecrated Life*, vol. 20, no. 2 (1999), 191-208; C. POZO, “The Theology of the Consecrated Life at the Recent Synod of Bishops,” in *Consecrated Life*, vol. 20, no. 2 (1999), 122-131; McDERMOTT, “The Fruits of Consultation,” 180-191; P.C. GIORDANO, “The Perspectives of Consecrated Life in the *Instrumentum laboris*,” in *Consecrated Life*, vol. 20, no. 1 (1999), 27-41; S. FAGAN, “Preparing for the Synod: The *Instrumentum laboris*,” in *RfR*, 33 (1994), 258-263; G. GHIRLANDA, “*L’instrumentum laboris* per il Sinodo sulla vita consacrata,” in *Periodica*, 83 (1999), 437-446; M. LETOURNEAU, “Consecrated Life and Its Role in the Church and in the World: An Overview of Responses to the *Lineamenta*,” in *UISG Bulletin*, no. 94 (1994), 9-18; B.G. HUME, “*Relatio ante disceptationem* Part II: Multifform Gift of Consecrated Life,” in *Consecrated Life*, vol. 20, no. 2 (1999), 66-73; ID., “*Relatio ante disceptationem* Part III: Challenges to Consecrated Life,” in *Consecrated Life*, vol. 20, no. 2 (1999), 74-85; ID., “Setting the Scene for the Synod,” in *RLR*, 33 (1994), 326-333; V. DE PAOLIS, “The Identity of the Consecrated Life from Vatican II to the Post-Synodal Apostolic Exhortation *Vita consecrata*,” in *Consecrated Life*, vol. 22, no. 2 (2000), 90-122; J. CHITTISTER, “Reflections on the Synod I,” in *RLR*, 34 (1995), 91-94; A. BANDERA, “*Vita consecrata*: Il numero iniziale,” in *Vita consacrata*, 33 (1997), 244-264.

3.4 — Instruction on Inter-Institute Collaboration for Formation *Attenta alla condizioni, 1998*

The Instruction on Inter-Institute Collaboration for Formation issued on December 8, 1998 had as its recipients the institutes involved in apostolic works (no. 2). It came as a follow-up on the recommendations made by the earlier documents on the need for inter-institute collaboration in formation.¹²⁴ The document is divided into four parts, with an introduction and a conclusion.

The introduction presents the purpose of the document as “to reflect on the formation of members of religious institutes in today’s circumstances and to propose some directives which guarantee a formation which is complete, solid, and consistent with the journey of the Church” (no. 1). The document stresses that it is meant to be a response to the challenges in formation arising from specific pedagogical needs due to fewer candidates, lack of formators and a small number of qualified teaching personnel (no. 3).

The first part of the instruction deals with the fundamental principles and practical directives with regard to inter-institute initiatives on formation. The instruction reaffirms that formation is an inalienable right and duty of each institute and can never be substituted by collaborative initiatives. It explains that in such initiatives formation is to fuse together the aspects which are proper to each institute and those which are common to all. It goes on to state that the Church is to ensure that the autonomy, patrimony and formation which is configured to the specific purpose of the institute is upheld and that the spiritual conditions and the juridic instruments which guarantee its fruitfulness, development and harmony in the ecclesial communion are assured (nos. 6-8).

In such collaborative initiatives, the internal authorities of religious institutes are to ensure that the role of a formative community and those of centers for collaboration are clearly distinguished. For the erection of such centers, the instruction directs that written consent of the local Ordinary is required, courses taught are to conform to the Magisterium of the Church and the professors and teachers are to be chosen for their competence, pedagogical ability and capability to work as a team (nos. 9-12).

The second part of the document deals with collaboration during the various phases of formation. It recommends collaborative initiatives during temporary vows and ongoing formation, including formation of candidates for

¹²⁴ See *PI*, nos. 98-100, in *AAS*, 82 (1990), 527-527, in *Origins*, 19 (1989-1990), 696-697; *ES II*, no. 37, in *AAS*, 58 (1966), 781, in *FLANNERY I*, 632.

orders. In such initiatives, the document cautions, the purpose and requirements of each stage of formation are to be respected and the training in such centers of collaboration is not to replace the formation programme of individual institutes. In designing such programmes, the courses offered are to supplement and be harmonized with formation programmes of institutes. Each institute is to retain its autonomy, as there no such a thing as “inter-institute formation” (nos. 13-18).

With regard to formation during temporary vows, the document acknowledges the significance of collaborative initiatives in formation in deepening of the spiritual, doctrinal, and pastoral formation, in fostering the Christian and human maturity, and in offering appropriate courses in view of preparation for perpetual profession. It recommends that such initiatives emphasize deepened knowledge of the ecclesiology promoted by the Second Vatican Council, aimed at ecclesial orientation in areas of evangelization, pastoral collaboration and inculturation. Such initiatives, however, should be mindful of the characteristics and circumstances of life of the professed. Those in charge of formation are to be involved in structuring, executing and evaluating the programmes in such centers (no. 17).

In part three, the document speaks of collaboration with regard to teaching religious sciences and philosophical and theological formation of the candidates for priesthood provided in centers erected for that purpose. The document recognizes the distinctions in the formation of lay religious and permanent deacons and that of religious who are candidates for priesthood. It directs that the specific requirements of each category must be respected. The document identifies institutes of religious sciences as centers for formation of lay religious and those of theological and philosophical formation for permanent deacons and religious who are candidates for priesthood. It distinguishes the roles, manner of erection and administration of these institutes.

Institutes of religious sciences are to offer a solid philosophical and theological foundation that prepares participants for evangelization work with sensitivity to the social and cultural human context and the principles of ecumenical and inter-religious dialogue, according to the signs of the times (cf. c. 821). They are erected by conferences of major superiors and approved by the Congregation for Consecrated Life and Societies of Apostolic Life. They are to be administered by a designated team accountable to this Congregation.

Centers for philosophical/theological formation are to fulfill the following requirements: canonical erection, clearly defined statutes which specify the manner of administration, structure of programmes, type of courses offered, qualification and quality of professors and teachers, manner of admission of

candidates, manner of evaluation and means of coordinating the overall formation programme. Institutes are to ensure that training in these centers is harmonized with formation in the community (nos. 19-22).

The last part of the document addresses collaboration in the formation of the formators themselves. Given that each institute may not be self-sufficient in view of its resources for training of future formators, the instruction recommends inter-institute centers in which appropriate courses offering expertise in different areas of formation are made available. Such programmes, besides preparing the future formators for their work, are of great benefit to their own spiritual growth and continuing formation (nos. 23-26). In its conclusion, the document highlights the significance of closer collaboration among institutes in the work of formation so that each institute is assured of offering its members adequate formation (no. 27).

The Instruction on Inter-Institute Collaboration for Formation is a valuable resource for apostolic religious institutes in responding to pedagogical formation needs which arise from specific challenges of few candidates and inadequate formation personnel by means of collaborative initiatives. Throughout the document, there is emphasis on the respect of the proper character and nature of individual institutes in all collaborative initiatives in formation. As Eusebio Hernandez affirms, the document presents the possibility of collaborative endeavours for formation among religious institutes, although it cautions that such endeavours are not to jeopardize the charismatic identity of individual religious families.¹²⁵ The instruction emphasizes the benefits and necessity of collaborative ventures in formation, while stressing that such ventures do not replace the obligation of institutes to form members. By calling on institutes to initiate joint ventures in formation work, the document promotes a spirit of sharing of gifts and resources between religious families, a sign of the communion nature of the Church. It serves as an expression of one way religious institutes can fulfill their duties through collaboration and solidarity.

3.5 — Instruction *Starting Afresh from Christ*, 2002

The instruction *Starting Afresh from Christ: A Renewed Commitment to Consecrated Life in the Third Millennium*, dated 19 May 2002 and published by the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life, is the fruit of the Congregation's plenary session held in Rome

¹²⁵ E.S. HERNANDEZ, "The Document on Inter-Institute Collaboration for Formation," in *Consecrated Life*, vol. 25, no. 1 (2005), 27.

between 25 and 28 September 2001. Mindful of the apostolic exhortation *Vita consecrata* of Pope John Paul II and his apostolic letter *Novo millennio ineunte*, the members of the plenary did not intend “to produce another doctrinal document” (no. 4). Their aim was “rather to help consecrated life enter into the great pastoral guidelines of the Holy Father with the contribution of his authority and of charismatic service to unity and to the universal mission of the Church” (no. 4).

The instruction is divided into five parts, an introduction and four chapters. The introduction (nos. 1-4), begins by highlighting the emerging difficulties and challenges consecrated persons have faced from Vatican II to the publication of *Vita consecrata*. It gives an opening note of hope to consecrated persons not to despair but to cast out into the deep (cf. Lk 5:4). The central message of the instruction is the invitation to consecrated persons to re-awaken the desire of intense evangelical radicality and renewed fidelity rooted in Christ, hence, the title, “starting afresh from Christ.”

Chapter one, besides acknowledging the positive contribution of consecrated persons to the entire Church, also recognizes the challenges they are facing in areas of apostolates and formation due to diminishing numbers and very few or no vocations in some parts of the world, which has led some religious to doubt the significance and identity of consecrated life. This scenario calls on religious families to explore greater collaboration and cooperation with the bishops and the entire Christian community in areas of formation and apostolate, while remaining open to the Spirit for guidance towards new ways of witnessing (nos. 5-10).

Chapter two reflects on the challenges and difficulties consecrated persons are facing in living the evangelical counsels and the influence of the present day society which esteems values contrary to those of the Gospel, thus raising doubts, shared by numerous consecrated persons about the relevance and survival of their state of life. The instruction gives a message of hope and refers to the difficult times as a moment of new *kairos*, a time of grace. It calls on all individual consecrated persons, supported by their superiors, to deepen the living of their consecration with fidelity and charismatic creativity, as did many of their founders and foundresses.¹²⁶

¹²⁶ See JOHN PAUL II, Message on the 8th World Day of Consecrated Life “Called to Faithfulness,” February 2, 2004, in *L'Osservatore Romano*, English ed., February 4, 2002, 1 and 11; ID., Message on the 11th World Day of Consecrated Life “Call to Radical Evangelical Fidelity,” February 2, 2007, in *L'Osservatore Romano*, English ed., February 7, 2007, 2-3; ID., Message on the 12th World Day of Consecrated Life “Follow Christ without Compromise,” February 2, 2008, in *L'Osservatore Romano*, English ed., February 6, 2008, 2 and 4.

On the subject of formation, the instruction recommends integral and life-long formation which harmonizes all aspects of life in the context of community and of daily life experiences. It calls for a pedagogy which responds to concrete spiritual and cultural situations. It recommends a well-planned formation *ratio* and carefully chosen and trained formation personnel for all institutes. The instruction exhorts all members of the ecclesial community to promote vocations and stresses prudence by institutes in assessing the authenticity of vocation in aspirants to consecrated life. It urges collaboration between institutes of consecrated life and the hierarchy of the Church at all levels. It calls for more attention and care by the bishops to institutes of diocesan right, nuns and consecrated virgins (nos. 11-19).

Chapter three, which deals with the spiritual dimension of consecrated life, employs the theological dimensions of consecrated life as a point of departure in “starting afresh from Christ.” This calls on consecrated persons to a renewed commitment to spiritual rebirth, to return to sources through fidelity to the celebration of Eucharist and meditation on the Word of God.¹²⁷ Being rooted in Christ, consecrated persons imitate Christ in living the evangelical counsels as a means of fraternal bonding in the form of communitarian life and witness of charity in mission. This compels them to serve Christ in others and to bring his mercy to them (nos. 20-32).¹²⁸

In chapter four, the instruction urges consecrated persons to reclaim their role and identity in living the evangelical counsels with fidelity and by involvement in evangelization work. Such a re-dedication, motivated by charity and apostolic fervor, is a powerful prophetic witness of God’s love. This calls for re-commitment to bringing the face of Christ to the world in areas such as justice and peace, ecumenical dialogue and the ecological crisis, all which threaten human dignity and survival. The instruction ends by urging institutes to design formation which focuses on radical evangelical witness especially for the young consecrated persons, to whom the survival of charisms is entrusted (nos. 33-46).

On ongoing formation, the document acknowledges the difficulties in this area as a result of the challenges facing consecrated persons today. With a strong tone of hope the instruction advocates for formation which will move new members towards a deep understanding of the spiritual and theological meaning of their consecration. Those in formation are to be helped to understand and appreciate their consecration as following of Christ and fulfilling his mission in the world so that they are able to witness to it with fidelity.

¹²⁷ See C.M. MANGAN, “The Spirituality of CICLSAL’s ‘Starting Afresh,’” in *R/R*, 62 (2003), 18.

¹²⁸ *Ibid.*, 19.

For consecrated life to preserve its identity and significance in the face of all the challenges, institutes of consecrated life should recommit themselves to give solid formation to their younger members who in turn will persevere in their religious families. Older members too are not to despair and give up in all aspects of their lives, including formation.

Starting Afresh from Christ portrays the solicitude and concern of the Church towards consecrated persons. It is punctuated with a strong message of reassurance and hope. It reaffirms the central role of consecrated life in the Church despite the challenges and difficulties consecrated persons are facing. It is a call to consecrated persons to a renewed fidelity to their evangelical witness and a recommitment to their identity and mission by means of spiritual rebirth centered on Christ. The document serves as a strong reaffirmation by the Church on the invaluable contribution of consecrated life in her life and mission. *Starting Afresh from Christ*, as Charles Mangan remarks, “is a restatement at the beginning of this millennium of the cherished principles of consecrated life.”¹²⁹

Conclusion

This study has attempted to bring out a deeper understanding of the norms on formation of religious by tracing their sources and their evolution, up to their promulgation as universal law. Besides the analysis of the norms in the Code of Canon Law, it has also discussed other norms which regulate the period of temporary vows and the pre-conciliar documents which touch on formation.

Formation of religious, as *PI*, no. 1 states, has remained a “constant concern to the Church.” This has been motivated in the present times more than ever before by the continuous and rapid changes in the human society, the needs of the Church and the emerging realities of religious life itself. Therefore, the Church requires that religious institutes take very seriously the duty of formation of their members throughout their whole life. The individual institutes through their internal authority are to ensure that members are accorded the time, opportunity and resources for formation. Formation of members remains an obligation for all institutes which is not to be substituted by any other formation initiatives outside the institute. Studies can be undertaken in centres outside the institute but such is not to replace or contradict the formation offered by individual institutes to their candidates.

¹²⁹ Ibid., 25.

With regard to formation during temporary vows, the Church requires all institutes to have a well-structured formation programme which specifies the ends, duration, content, manner of evaluation, and the pedagogy of this stage of formation in accord with the institute's proper law. It also requires members duly designated to the office of the director of members in temporary vows and other supportive structures which contribute to the effective formation of members, like presence of formative community and apostolates which do not impede formation.

Temporary vows is a time of testing, of deepening what was learnt during the novitiate and of further discernment for both the candidate and the institute on the suitability for permanent commitment. It is, therefore, probationary and formative in nature. This implies that all the formative experiences and training are to be oriented toward achieving the unity of life.

In sum, the 1983 Code and the post-conciliar documents highlight the main characteristics of formation during temporary vows. Firstly, this formation is to proceed gradually and naturally in stages, taking into account the capacity and pace of development of the individual candidate. Secondly, formation during temporary vows is to be integral, that is, harmoniously blending the doctrinal, apostolic, professional and spiritual aspects of religious life. This is to aim at the unity of life which is the goal of formation. Thirdly, this stage of formation is to be configured to the nature, character and purpose of individual institutes, keeping in mind the needs of the Church. Fourthly, it is to be adequate. The overall structure of post-novitiate formation is to orientate the candidate not only to live the life of the institute more fully and to fulfill its mission more effectively in the present, but also to foresee the needs of the institute in the future. Fifthly, when it is appropriate, formation during temporary vows is to safeguard acquiring academic credentials for the purpose of professional qualification and apostolic competency of religious.

Numerous post-conciliar documents have expressed the solicitude of the Church towards religious life in general and formation in particular. The Church is constantly discerning new ways to meet the ever-emerging challenges facing formation. She affirms in these documents that formation is an ecclesial task, not a job left only to religious institutes. Each of the post-conciliar documents discussed in this study demonstrate the response of the Church to specific challenges facing formation of religious. They also demonstrate that the provisions of the Code require supplementary directives that address the concern at hand.

OBSTINATE PERSISTENCE IN DOCTRINAL ERROR: THE DELICTS OF CANON 1371, 1°

STEPHEN S. DOKTORCZYK*

SUMMARY — The author attempts to demonstrate the importance of canon 1371, 1° by presenting its sources, by examining developments after the promulgation of the current Code of Canon Law, and by analyzing key words in the canon. He establishes that the Church has expected fidelity to her teachings from the time of the apostles and has concluded that competent ecclesiastical authority has a duty to insist on such fidelity for the good of the one who preaches or teaches as well as to the faithful to whom the preaching or teaching is directed. By means of this canon, which insists that an offender always first be warned of erroneous ways and thereby given an opportunity to reform, the Code provides an Ordinary the tools needed to protect the faith while helping to ensure fairness towards the individual preacher or teacher.

RÉSUMÉ — L'auteur tente de démontrer l'importance du canon 1371, 1°, en présentant ses sources, en examinant les développements suivant la promulgation du Code de droit canonique actuel et en analysant les mots-clés du canon. Il établit que l'Église s'est attendue à la fidélité à ses enseignements depuis le temps des apôtres et a conclu que l'autorité ecclésiastique compétente a le devoir d'insister sur cette fidélité pour le bien de celui qui prêche ou qui enseigne et celui des fidèles qui reçoivent cette prédication ou cet enseignement. Par ce canon, qui exige que le délinquant reçoive toujours une monition de cesser ses actes erronés et, par ce fait, qu'il ait l'occasion de se réformer, le Code fournit à l'ordinaire les outils nécessaires pour protéger la foi tout en assurant l'équité envers le prédicateur ou le maître.

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Introduction

Clerics and those teaching theological disciplines have an important and even crucial role in the formation of the faithful, be they people who come to Mass or who frequent their lectures. Those in teaching positions have a serious duty to pass on in full the Catholic faith, always for the salvation of souls, in order to assist lay people to fulfill their obligation and exercise their right “to acquire knowledge of Christian doctrine appropriate to the capacity and condition of each in order for them to be able to live according to this doctrine, announce it themselves, defend it if necessary, and take their part in exercising the apostolate.”¹

St. Paul wrote about the problem of erroneous teaching on at least three occasions, warning his listeners never to “pervert the gospel of Christ.”² He wrote to the Galatians, “if anyone is preaching to you a gospel contrary to that which you received, let him be accursed.”³ In his letter to the Romans, St. Paul took a strong stance against those “who create dissensions and difficulties, in opposition to the doctrine which [the Romans had been] taught.” He instructed the Romans to avoid such persons, who “do not serve our Lord Christ, but their own appetites, and by fair and flattering words they deceived the hearts of the simple-minded.”⁴ The same St. Paul wrote to Timothy “that in later times some will depart from the faith by giving heed to deceitful spirits and doctrine of demons, through the pretensions of liars whose consciences are seared.”⁵ St. James exhorted his readers that not many should become teachers because “we who teach shall be judged with greater strictness.”⁶

The Church throughout the ages has continued this insistence on doctrinal fidelity, especially of clerics, religious, and theologians. In this same tradition

¹ Canon 229: “Laici, ut secundum doctrinam christianam vivere valeant, eandemque et ipsi enuntiare atque, si opus sit, defendere possint, utque in apostolatu exercendo partem suam habere queant, obligatione tenentur et iure gaudent acquirendi eiusdem doctrinae cognitionem, propriae uniuscuiusque capacitate et conditioni aptatam.” *Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus*, Libreria editrice Vaticana, 1989, English translation *Code of Canon Law: Latin-English Edition, New English Translation*, prepared under the auspices of the CANON LAW SOCIETY OF AMERICA, Washington, DC, Canon Law Society of America, 1999, canon 229. All references to the canons of the 1983 Code will be styled “c.” for canon and “cc.” for canons, followed by the canon number(s).

² Gal 1:7. In this paper, all quotations from the Bible are from the Revised Standard Version.

³ Gal 1:9.

⁴ Rom 16:17-18.

⁵ 1 Tim 4:1.

⁶ Jas 3:1.

is the subject of this study, c. 1371, 1° of the Code of Canon Law. It states: “The following are to be punished by a just penalty: 1° a person who, apart from the case mentioned in can. 1364 §1, teaches a doctrine condemned by the Roman Pontiff or by an Ecumenical Council or obstinately rejects the doctrine mentioned in can. 750 §2 or in can. 752 and, when warned by the Apostolic See or by the Ordinary, does not detract.”⁷

The study is in four parts. Part I will examine the sources of this penal law, in particular c. 2317 of the 1917 Code and its *fontes*. Part II surveys several juridical developments after the 1983 Code which are related to c. 1371, 1°, especially the 1989 Profession of Faith and the 1998 apostolic letter *Ad tuendam fidem* which added a new, second paragraph to c. 750 and expanded the scope of c. 1371, 1°. The third part considers two other canons related to c. 1371, 1°, namely, cc. 1364 §1 and 752. In the fourth and final section, the key terms of c. 1371, 1° are examined in order to discover its proper meaning in text and context (cf. c. 17).

We hope to demonstrate the importance of safeguarding and protecting the faith with the premise that, while the individual preacher or teacher bears his or her own responsibility for being faithful to the authentic teachings of the Church, bishops and other competent authorities ultimately have the duty to ensure proper teaching. When competent authority becomes aware by whatever means that a certain preacher or teacher is erring in matters of faith and morals, he must take fitting disciplinary action in order to correct the situation so as to repair any scandal caused, restore justice and reform the offender (cf. c. 1341).⁸ The scope of this brief study does not allow us to

⁷ “Iusta poena puniatur: 1°: qui, praeter casum de quo in can. 1364 §1, doctrinam a Romano Pontifice vel a Concilio Oecumenico damnatam docet vel doctrinam, de qua in can. 750 §2 vel in can. 752, pertinaciter respuit, et ab Apostolica Sede vel ab Ordinario admonitus non retractat.” Translation of this specific canon is taken from E. CAPARROS – M. THÉRIAULT – J. THORN (eds.), *Code of Canon Law Annotated*, Montréal, Wilson & Lafleur Limitée, 2004, 1068 [hereafter, *CCLA*]. This translation differs from that which appears in CANON LAW SOCIETY OF AMERICA, *Code of Canon Law Latin-English Edition*, as regards the word “praeter,” which the latter renders “in addition to” and the former, “apart from.”

The same canon, in its second section, establishes the crime of persisting in disobedience, after a warning, to legitimate precepts or prohibitions of the Apostolic See, the Ordinary or superior.

⁸ V. De Paolis and D. Cito note that c. 1371, 1° is located in Title II of Book VI, which addresses delicts or offenses against Church authorities and the freedom of the Church. In this way the legislator focuses on disobedience to the Church magisterium. The placement was different in the 1917 Code, where c. 2317 was placed under Title XI on delicts contrary to the faith and unity of the Church. Since a pastor’s “teaching office is not above the word of God, but serves it, teaching only what has been handed on, listening to it devoutly, guarding it scrupulously and explaining it faithfully in accord with a divine commission and

address what a just penalty might be for persistent disobedience to the competent authority that first issues the warning, but this matter is treated in depth in another publication.⁹

1 — Canon 2317 of the 1917 Code

The principal source for c. 1371, 1° of the 1983 Code is c. 2317 of the 1917 Code.¹⁰ This canon of the former Code reads:

Those pertinaciously teaching and defending, whether publicly or privately, doctrines that have been condemned by the Apostolic See or a General Council, but formally defined as heretical, are prevented from the ministry of preaching the word of God and [from the ministry] of hearing sacramental confessions and from any office of teaching, with due regard for other penalties that a sentence of condemnation might establish or that an Ordinary, after a warning, concludes were necessary to repair scandal.¹¹

The canon addresses those who teach and defend doctrines that have been condemned by either the Apostolic See or a General Council. These doctrines, however, are not those formally defined as heretical. Since they are “less” on the scale of importance or gravity, the punishment foreseen to be imposed

with the help of the Holy Spirit” (DV 10b), the authors conclude that it would preferable for c. 1371, 1° to be placed under Title I (particular offenses) right after c. 1364, which addresses apostasy, heresy and schism.

Cf. V. DE PAOLIS – D. CITO, *Le sanzioni nella Chiesa. Commento al Codice di Diritto Canonico Libro VI*, Città del Vaticano, Urbaniana University Press, 2000, 312-313. “Sarebbe stato forse preferibile e maggiormente chiarificatore collocare il §1 del canone subito dopo il delitto di eresia, apostasia e scisma (can. 1364) così come è stato fatto per il can. 750 §2, e lasciare il §2 come canone a sé stante.”

⁹ See S.S. DOKTORCZYK, *Persistent Disobedience to Church Authority: History, Analysis and Application of Canon 1371*, 2°, Tesi Gregoriana 105, Rome, Gregorian and Biblical Press, 2016.

¹⁰ There are twenty fonts from which this canon draws, beginning with the time of Pope Martin V’s constitution against the followers of John Wyclif and John Hus. Cf. MARTIN V, Constitution *Inter cunctas* 22 February 1418, in P. GASPARRI (ed.), *Codicis Iuris Canonici Fontes I*, Romae, Typis Polyglottis Vaticanis, 1923, 46-57. The Council of Constance issued the mentioned Constitution.

¹¹ “Pertinaciter docentes vel defendentes sive publice sive privatim doctrinam, quae ab Apostolica Sede vel a Concilio Generali damnata quidem fuit, sed non uti formaliter haeretica, arceantur a ministerio praedicandi verbum Dei audiendive sacramentales confessiones et a quolibet docendi munere, salvis aliis poenis quas sententia damnationis forte statuerit, vel quas Ordinarius, post monitionem, necessarias ad reparandum scandalum duxerit.” *Codex iuris canonici, Pii X Pontificis Maximi iussu digestus*, Benedicti Papae XV auctoritate promulgatus, Typis polyglottis Vaticanis, 1917, English translation E.N. PETERS (ed.), *The 1917 Pio-Benedictine Code of Canon Law*, San Francisco, Ignatius Press, 2001, canon 2317.

upon offenders is likewise less. Whereas a heretic is punished with excommunication,¹² the subjects of *CIC/17* c. 2317 are to be prevented from exercising the ministry of preaching the word of God, from hearing sacramental confessions and from any other office of teaching. Other facultative penalties may also be attached if competent authority deems them necessary to repair scandal.

1.1 — Two Sources of *CIC/17* c. 2317

Pius X and the two popes who immediately preceded him, Leo XIII and Pius IX, were faced with confronting what became known as “modernism.” In an attempt to safeguard the Church from modernist errors (for example, a rationalistic approach to the bible and the belief that the substance of doctrine can evolve over time), Pius X penned *Praestantia Scripturae*,¹³ in which he expressed the decisions of the Pontifical Council of Biblical Studies and listed the penalties against transgressors of the antimodernist prescriptions. In the same *motu proprio*, Pius X declared automatically excommunicated (*latae sententiae*) anyone who would refute certain propositions, opinions or doctrines.¹⁴ The excommunication, reserved to the Roman Pontiff, is independent of other penalties that can be incurred by one who propagates and defends heresy, heretical propositions, opinions or doctrines or who challenges material in one of the mentioned documents. This *motu proprio* of Pius X exhorts ordinaries and superiors of religious institutes to be vigilant over teachers in seminaries, taking care that they do not teach modernist errors or introduce theological novelties. Moreover, there is not to exist the smallest doubt that candidates to the priesthood are “chasing” condemned doctrine or novelties; such men should not be approved for ordination to the priesthood.¹⁵

¹² *CIC/17*, c. 2314 §1: “Omnes a christiana fide apostatae et omnes et singuli haeretici aut schismatici: 1º. incurrunt ipso facto excommunicationem.”

¹³ Pius X, *motu proprio Praestantia Scripturae*, 18 November 1907, in *ASS*, 40 (1907), 723-726.

¹⁴ *Ibid.*, 725. Referred to in the *motu proprio* are two documents: *SACRA CONGREGATIO SANCTAE ROMANAE ET UNIVERSALIS INQUISITIONIS*, Decree *Lamentabili sane exitu*, 3 July 1907, in *ASS*, 40 (1907), 470-478; and Pius X, Encyclical *Pascendi Dominici gregis*, 8 September 1907, in *ASS*, 40 (1907), 596-628. The decree condemns errors in Scriptural exegesis, deformation of religious history and interpretation of dogma. The encyclical letter expressly addresses specific errors of the modernists, authorizes and orders bishops to keep watch over harmful books, commands that the bishop name a censor (52), orders each diocesan bishop to create a Council of Vigilance (55) and chastises those who, especially due to pride, fail to heed the words of the pope.

¹⁵ Ordinaries are to be vigilant over their seminaries “[...] repertosque erroribus modernistarum imbutos, novarum nocentiumque rerum studiosos, aut minus ad praescripta Sedis Apostolicae, utcumque edita, dociles, magisterio prorsus interdicane a sacris item ordinibus adolescentes excludant, qui vel minimum dubitationis iniciant doctrinas se consecrari damnatas novitatesque maleficas.” Pius X, *motu proprio Praestantia Scripturae*, 725.

Pius X is the author of another source for c. 2317, dating only seven years before the promulgation of the 1917 Code. His *motu proprio Sacrorum antistitum* also addresses modernism and, among other things, contains an oath which was to be sworn by all clergy, pastors, confessors, preachers, religious superiors, and professors in philosophical-theological seminaries.¹⁶ The oath itself is three paragraphs in length and concerns doctrinal and dogmatic issues.

CIC/17 c. 2317 is applicable to those who preach the word of God, who hear sacramental confession or who have been entrusted with teaching in the Church. While certainly priests and bishops fall into the above categories, some lay people too might preach (though not in churches, according to *CIC/17* c. 1342) or hold a teaching office in the Church. The canon lays out specific penalties which could be imposed upon one who pertinaciously teaches and/or defends condemned doctrines, including being prevented from hearing sacramental confession, preaching the word of God, and any teaching office. We shall now examine two of the key words of the canon.

1.2 — Two Key Terms: *docentes* and *defendentes*

The participial verb *docentes* (*docere* = to teach, instruct, inform, show, tell) refers to the transmitting of any doctrine,¹⁷ whether publicly or privately, in front of many, few, or even only one person. In the context of *CIC/17* c. 2317, *docere* could involve the simple making of an assertion that a condemned doctrine may be accepted as true. *Docere* could also include the expression of an opinion that a doctrine which indeed was condemned by competent authority was in fact not condemned.¹⁸ That the teaching or defending be done publicly means that it takes place in a classroom or other public setting. A delict could be committed in either setting. By contrast, a conversation in a teacher's office, even if more than one person were present, would be private.

¹⁶ PIUS X, *motu proprio Sacrorum antistitum*, 1 September 1910, in AAS, 2 (1910), 655-680. The *motu proprio* forbids books containing modernistic thought from being part of a seminary or diocesan library and introduces the necessity of an author asking for and eventually receiving a *nihil obstat* and *imprimatur* before his or her work may be printed. The oath is found on pages 669-671 of the cited text.

¹⁷ The root of the word *doctrina* can be traced back to *docere*: to teach or instruct. C. LEWIS – C. SHORT, *A Latin Dictionary*, Oxford, Clarendon Press, 1879, 605.

¹⁸ This view or interpretation is held by many canonists, including Conte a Coronata, Chelodi, Bucceroni, Hilarium a Sexten, Pistocchi, Salucci, Sole and Ballerini-Palmieri. M. CONTE A CORONATA, *Institutiones Iuris Canonici* IV, Turin, Marietti, 1955, 320, n. 1871.

Since preaching at Mass includes teaching, the legislator likely did not intend for *docentes* (teaching) to be interpreted as taking place only in the classroom. We turn to *CIC/17* c. 1347 to find what should and should not make up a sermon. In §3 of the canon, we read that if a preacher—*concionator*—disseminates errors or scandal, the prescriptions of *CIC/17* c. 2317 are to be observed. Even though the word *docere* does not appear in *CIC/17* c. 1347, that the canon makes a reference to prescriptions found in *CIC/17* c. 2317 leads us to conclude that teaching is an element of preaching and that preachers are addressed in *CIC/17* c. 2317.¹⁹

We can cite another example here. Only one month after the promulgation of the 1917 Code, the Sacred Congregation for the Consistory produced an instruction entitled *Ut quae*, which addresses the regulating of who is allowed to preach at Mass.²⁰ The instruction is insistent that priests are not to invite other priests, including religious, from outside the diocese to preach unless the Ordinary or superior has verified that the prospective preacher is suitable. Number 10 of the instruction requires the Ordinary or superior, by an obligation gravely binding in conscience (*onerata graviter eorum conscientia*), to verify the piety, knowledge and suitability of the visiting priest before granting the requested faculty.²¹ Numbers 20 and 27 of the same Instruction reference *CIC/17* c. 1347.²² Suspension, even *a divinis*, is to be imposed on one who invites another to preach without having obtained the required permission from the Ordinary or on the one who accepts the invitation, not having received from the Ordinary authorization to preach.²³

We consider now the *defendentes* of a condemned teaching—those who defend, guard, protect, support, preserve, maintain, speak/plead/write in defense of it. The canon states that one is not to offer arguments and proofs in order to show that a teaching condemned by Church authority should not

¹⁹ *CIC/17* c. 18 states that ecclesiastical laws are to be understood according to the meaning of their own words considered in their text and context. Moreover, if a doubt remains, reference is to be made to parallel provisions of the Code: “Leges ecclesiasticae intelligendae sunt secundum propriam verborum significationem in textu et contextu consideratam; quae si dubia et obscura manserit, ad locos Codicis parallelos, si qui sint, ad legis finem ac circumstantias et ad mentem legislatoris est recurrendum.”

²⁰ SACRA CONGREGATIO CONSISTORIALIS, Instruction *Ut quae*, 28 June 1917, in AAS, 9 (1910), 328-334 (Latin); 335-341 (Italian). Cf. BENEDICT XV, Apostolic Constitution *Providentissima Mater Ecclesia*, 27 May 1917, in AAS, 9 (2) (1917), 5-8.

²¹ SACRA CONGREGATIO CONSISTORIALIS, Instruction *Ut quae*, 330, n. 10.

²² To illustrate that some issues remain controversial, the last part of no. 20 states “[...] a tutti i predicatori resta in tutto ed assolutamente proibito di parlare nelle chiese di cose politiche” (all preachers are absolutely prohibited to speak of political things in churches).

²³ SACRA CONGREGATIO CONSISTORIALIS, Instruction *Ut quae*, 333, nn. 30 and 31.

have been condemned.²⁴ How to define this “defending,” however, is not universally agreed upon. For example, Pistocchi states that when one expresses his own thinking he is neither teaching nor defending. He would not then, at least so far as the canon in question is concerned, be culpable if he merely manifests his own opinion concerning a given doctrine.²⁵

H.A. Ayrinhac holds that the condemned doctrine could be defended in a verbal or written fashion and in a public or private way.²⁶ This may take place in a school setting or elsewhere. One who defends a condemned doctrine may in reality not wholeheartedly agree with its contents, but if he externally defends the doctrine, it is enough to place him in the category of *defendentes*.²⁷

Conte a Coronata, citing other canonists of the same period, points out that the Code differs from the Constitution *Apostolicae Sedis* no. 14, which classifies as a delict the teaching or defense of a condemned proposition.²⁸ Canon 2317, however, defines the object as a condemned doctrine (*doctrina damnata*). This same canonist holds that this condemned doctrine may be contained in a condemned proposition in some pontifical document or it might not take the specific form of a proposition, or thesis, (“praeterquam in propositione damnata contineri potest in aliquo documento pontificio aut Sanctae Sedis quod formam specificam *propositionis* seu thesis non habeat”). Moreover, *Apostolicae Sedis* does not require that a warning be given before

²⁴ “Defendere aliquam doctrinam idem est ac argumentis et probationibus ostendere illam doctrinam esse veram et damnationem quae forte doctrinam illam afficit iniustam esse, doctrinamque damnatam non fuisse damnandam.” M. CONTE A CORONATA, *Institutiones Iuris Canonici* IV, 321, n. 1871.

²⁵ “Esprimere il proprio pensiero non è né insegnare né difendere; e non viene colpito da questo canone chi manifesta il proprio parere anche in ordine alle dottrine da esso contemplate. Quando la legge vuole condannare l’espressione del proprio parere o il parere stesso difforme da una determinata dottrina ammessa o condannata ufficialmente, adopera termini analoghi a quelli adoperati nella Costituzione “*Unigenitus*” di Clemente XI: *Qui contra sentire praesumunt* etc.” M. PISTOCCHI, *I canoni penali del Codice ecclesiastico*, Torino, Marietti, 1925, 154.

²⁶ H.A. AYRINHAC, *Penal Legislation on the New Code of Canon Law*, n. 208 as found in M. CONTE A CORONATA, *Institutiones Iuris Canonici* IV, Torino, Marietti, 1950, 321, n. 1871.

²⁷ In fact, the issue is more of obstinacy: “ut procedi possit non est necessarium ut error sit damnatus ut haereticus, ne ut publice doceatur, at requiritur ut *pertinaciter* doceatur aut defendatur sive in publico sive privatim.” CONTE A CORONATA, *Institutiones Iuris Canonici* II, 281, n. 929.

²⁸ PIUS IX, Bull *Apostolicae Sedis*, 12 October 1869, in ASS, 6 (1870-1871), 7-58. In this papal document, the Roman Pontiff reduces the number of *latae sententiae* censures and clarifies the ones that remain. The bull retains 45 censures, some of which are reserved to the pope or local bishop. Cf. A. CALABRESE, *Diritto penale canonico*, Città del Vaticano, Libreria Editrice Vaticana, 2006, 109.

any censures be imposed (or, obviously, before one is *latae sententiae* excommunicated, which is also foreseen as a possible punishment).²⁹

1.3 — Competent Authority and Warning

CIC/17 c. 2317 is specific about which authority would have condemned the above-mentioned doctrine. It is the Apostolic See, which includes not only the Roman Pontiff but the dicasteries that make up the Roman Curia,³⁰ or a General Council. Doctrine condemned in a *Concilium Generale* but independent of the Roman Pontiff does not fall under the purview of this canon.³¹ Besides the Apostolic See or a General Council, the other competent authority is the Ordinary, who is responsible to issue a warning to the accused. Presumably he would also be the one to punish the cleric and enforce the sanctions listed in the canon.

The law required that a warning first be given before penalties could be imposed, as indicated in two places. First is the use of the word *pertinaciter*,³² defined as pertinacious or obstinate. The second is *post monitum* (after a warning or after having been warned). The canon requires that the Ordinary first issue a warning before applying the penalties mentioned above or even other penalties he believes are necessary to repair scandal. At least two canonists hold that either a paternal or canonical warning would suffice.³³

²⁹ Cf. H.A. AYRINHAC, *Penal Legislation in the New Code of Canon Law*, New York, Benziger Brothers 1920, n. 208. The author provides another example in a footnote: “Doctrina est propositio theoretica, non praescriptio vel prohibitio. Si quis, v.g., assereret licere reum peccati gravis accedere ad communionem sine confessione sacramentali, quae possibilis esset, non doctrinam, sed propositionem practicam damnatam Trident. Sess. XII, c. 11, doceret.” Cf. A. VERMEERSCH – J. CREUSEN, *Epitome Iuris Canonici* III, Mechliniae-Romae, H. Dessain, 1956, 317, n. 516.

³⁰ “Nominem Apostolicae Sedis in Codice venit non solum Romanus Pontifex sed et omnia dicasteria Curiae Romanae.” M. CONTE A CORONATA, *Institutiones Iuris Canonici* IV, 321, n. 1871. The author cites several other authors and theologians, including St. Augustine, to back up his statement. Cf. *CIC/17* c. 7.

³¹ “Cum *Concilium Generale* haberi non possit sine Capite, propositiones seu doctrinae forte a collegio quodam Episcoporum, indipendenter a Romano Pontifice, damnatae, non sunt considerandae doctrinae damnatae ad mentem Codicis hoc loco.” M. CONTE A CORONATA, *Institutiones Iuris Canonici* IV, 322, n. 1871.

³² The requirement that for one to be subject to a penalty he must be pertinacious means that one could not use ignorance as an excuse since by definition he would have been warned concerning the condemned doctrine. Cf. M. CONTE A CORONATA, *Institutiones Iuris Canonici* IV, 124, n. 1719.

³³ Cf. M. CONTE A CORONATA, *Institutiones Iuris Canonici* IV, 322, n. 1871 and A. VERMEERSCH – J. CREUSEN, *Epitome Iuris Canonici* III, 317, n. 516. These latter authors hold that a private warning would also suffice: “Delicti condiciones sunt, ex parte subiecti *pertinacia* (1), quae

As mentioned, this warning is to be given by the Ordinary, not local Ordinary. The major superior of an exempt clerical religious institute enjoys the same powers of an Ordinary over his schools.³⁴ Yet *CIC/17* c. 1381 §§2, 3 mentions the right and duty of the local Ordinary to be vigilant about schools in his territory, including the approving of teachers and religion books. He has the authority to remove teachers or books or to have them removed.³⁵

2 — Post 1983 Developments Related to c. 1371, 1°

Canon 1371, 1° is one of the canons of the 1983 Code that has been altered since its promulgation. This second part of our study considers the key juridical developments related to this change, in particular the 1989 Profession of Faith and the 1998 apostolic letter *Ad tuendam fidem*. We shall also briefly consider a commentary of the Congregation for the Doctrine of the Faith on the concluding formula of the Profession of Faith. This latter is a theological commentary, but it has juridical implications.

2.1 — The Profession of Faith

At the time of promulgation, c. 1371, 1° of the 1983 Code was more limited in its scope than now,³⁶ as it did not address teachings that were not declared

generatim saltem privatam monitionem quondam supponit; ex parte obiecti, actus docendi vel defendi doctrinam damnatam a Suprema potestate ecclesiastica, sed non ut haereticam.”

³⁴ M. CONTE A CORONATA, *Institutiones Iuris Canonici* IV, 323, n. 1872. “Codex hic loquitur de *Ordinario*, non de *Ordinario loci*, quam ob rem hoc nomine veniunt et Superiores maiores in religionibus clericalibus exemptis pro suis scholis.”

³⁵ It might be seen as noteworthy that the above-mentioned papal documents, given *motu proprio* by Pius X (cf. footnotes 6, 7 and 10), are not included among the fonts listed for *CIC/17* c. 1381.

³⁶ The text of c. 1371, 1° when the *CIC* was promulgated in 1983, read thus: “Iusta poena puniatur: 1° qui, praeter casum de quo in can. 1364, §1, doctrinam a Romano Pontifice vel a Concilio Oecumenico damnatam docet vel doctrinam, de qua in can. 752, pertinaciter respuit, et ab Apostolica Sede vel ab Ordinario admonitus non retractat.” Canon 752: “Non quidem fidei assensus, religiosum tamen intellectus et voluntatis obsequium praestandum est doctrinae, quam sive Summus Pontifex sive Collegium Episcoporum de fide vel de moribus enuntiant, cum magisterium authenticum exercent, etsi definitivo actu eandem proclamare non intendunt; christifideles ergo devitare curent quae cum eadem non congruant.” The contents of the canon in its original form are related to at least three documents produced not long before the promulgation of the 1983 *CIC*. These include: *SACRA CONGREGATIO PRO DOCTRINA FIDEI, Nova agenda ratio in doctrinarum examine*, 15 January 1971, in *AAS*, 63 (1971), 234-236;

to be of divine origin but that nonetheless were to be held definitively by the faithful. John Paul II saw the need to fill this lacuna. In 1989, the Congregation for the Doctrine of the Faith published a “Profession of Faith and Oath of Fidelity.” Among those who are required to make the profession of faith and the oath of fidelity are three positions pertinent to our study: (1) those teaching theological disciplines in Catholic universities;³⁷ (2) a man before being ordained a deacon; and (3) a newly appointed seminary rector before his installation.³⁸ The Profession of Faith consists of the Nicene Creed with three paragraphs attached to it. The first paragraph corresponds to c. 750 § 1 and the third to cc. 752-753. The introduction of the second paragraph, however, resulted in a *lacuna legis* in the Code, since there was no corresponding canon that covered it. The second paragraph states: “I also firmly accept and hold each and everything definitively proposed by the Church regarding teaching on faith and morals,”³⁹ referring to truths connected with divine revelation. Since, at this point, there was nothing on this in *CIC* 1983, a corresponding norm needed to be developed. We will soon see that this entailed adding a second paragraph to c. 750 and adding a reference to it in c. 1371, 1°.

2.2 — The Apostolic Letter *Ad tuendam fidem*

To provide corresponding legislation for paragraph two of the conclusion of the Profession of Faith, including a provision for a just penalty, John Paul II responded in 1998 by promulgating an apostolic letter *motu proprio* which is commonly known by its incipit, *Ad tuendam fidem*.⁴⁰ The major legislative

JOHN PAUL II, Apostolic Constitution *Sapientia christiana*, 15 April 1979, in AAS, 71 (1979), 469-499 (esp. n. 30); SACRA CONGREGATIO PRO INSTITUTIONE CATHOLICA, *Ordinationes*, 29 April 1979, in AAS, 71 (1979), 500-521 (esp. nn. 22-23).

³⁷ Some authors argue that the universities in question are only the ecclesiastical (pontifical) universities subject to *Sapientia christiana*. For a discussion of this point, see John M. HUELS, *The Teaching Office of the Catholic Church: A Commentary on Book III of the Code of Canon Law*, Ottawa, Faculty of Canon Law, Saint Paul University, 2017, 341-342. It should be noted that the principal source of universal law governing Catholic universities, unlike *Sapientia christiana*, has no requirement of making the Profession of Faith or the Oath of Fidelity. Cf. JOHN PAUL II, Apostolic Constitution *Ex corde Ecclesiae*, 15 August 1990, in AAS, 82 (1990), 1475-1509.

³⁸ CDF, *Profession of Faith and Oath of Fidelity*, 9 January 1989, in AAS, 81 (1989), 104-106.

³⁹ CDF, *Profession of Faith and Oath of Fidelity*, n. 3.

⁴⁰ JOHN PAUL II, Apostolic Letter *motu proprio Ad tuendam fidem* by which certain norms are inserted into the *Code of Canon Law* and into the *Code of Canons of the Eastern Churches*, 18 May 1998, in AAS, 90 (1998), 457-461. For more recent changes to the *CIC* 1983, cf. BENEDICT XVI, Apostolic Letter *motu proprio Omnium in mentem*, 26 October 2009, in AAS, 102 (2010), 8-10.

innovation of this apostolic letter is the addition of a second paragraph to c. 750.

§2. Each and every thing which is proposed definitively by the magisterium of the Church concerning the doctrine of faith and morals, that is, each and every thing which is required to safeguard reverently and to expound faithfully the same deposit of faith, is also to be firmly embraced and retained; therefore, one who rejects those propositions which are to be held definitively is opposed to the doctrine of the Catholic Church.⁴¹

B. Ferme analyzes this development. “This is a very clear and unambiguous legislative act issued by the Pontiff on his own initiative” and concerns “highly significant and important ecclesiastical questions especially in legislative and administrative areas.”⁴² The Supreme Pontiff explains the “utmost importance” of the second paragraph of the *Professio fidei*. He states that “it refers to truths that are necessarily connected to divine revelation [which] illustrate the Divine Spirit’s particular inspiration for the Church’s deeper understanding of a truth concerning faith and morals, with which they are connected either for historical reasons or by a logical relationship.”⁴³

In this same apostolic letter, Pope John Paul II made a change to c. 1371, 1° by calling for a just penalty for those who obstinately reject certain teachings included in the new c. 750 §2. As a result, since 1998, the text of c. 1371, 1° reads:

Iusta poena puniatur: ... qui, praeter casum de quo in can. 1364 §1, doctrinam a Romano Pontifice vel a Concilio Oecumenico damnatam docet vel doctrinam, de qua **in can. 750 §2 vel** in can. 752, pertinaciter respuit, et ab Apostolica Sede vel ab Ordinario admonitus non retractat.

The doctrine of c. 750 §2, as we have seen, are teachings to be held definitively which, although not declared to be of divine revelation, are “required to safeguard reverently and to expound faithfully the same deposit of faith.” Anyone who rejects propositions that are to be held definitively places himself against the teaching of the Church and, as per c. 1371, 1°, is subject to a just penalty.

⁴¹ § 2. Firmiter etiam amplectenda ac retinenda sunt omnia et singula quae circa doctrinam de fide vel moribus ab Ecclesiae magisterio definitive proponuntur, scilicet quae ad idem fidei depositum sancte custodiendum et fideliter exponendum requiruntur; ideoque doctrinae Ecclesiae catholicae adversatur qui easdem propositiones definitive tenendas recusat.

⁴² B. FERME, “*Ad tuendam fidem*: Some Reflections,” in *Periodica*, 88 (1999), 583. The author also states that since the apostolic letter was undertaken *motu proprio* by the Roman Pontiff, “there can be absolutely no discussion as to its legislative or general import and significance.”

⁴³ JOHN PAUL II, *Ad tuendam fidem*, n. 3.

The second paragraph of the Profession of Faith and the new second paragraph of c. 750 are in continuity with the theological tradition which was discussed at both Vatican I and Vatican II. Canon 9 of the 1 December 1870 schema of the First Vatican Council is not listed as an official source of *Ad tuendam fidem*, probably because the canon was never promulgated due to the sudden closure of that Council. Nonetheless, the contents of the schema help us to understand the mind of the legislator. The canon foresees the condemnation of anyone who states “that the infallibility of the Church is limited only to what is contained in divine revelation and does not also extend to other truths that are necessarily required for the deposit of the revelation to be kept whole.”⁴⁴ There was continuity between what the Fathers of the First Vatican Council discussed, as recorded in the 1870 schema, and what the Fathers who made up the doctrinal commission at the Second Vatican Council deliberated ninety years later. This commission noted that “the object of the infallibility of the church, thus specified, has the same scope of the revealed deposit: and, therefore, is extended to everything and only what directly refers to the same revealed deposit, or to what is required for the same deposit to be guarded and faithfully expounded.”⁴⁵

2.3 — CDF Doctrinal Commentary

In order to clarify the kind of doctrine the legislator intended in *Ad tuendam fidem*, the CDF released a “Doctrinal Commentary on the Concluding Formula of the *Professio fidei*.”⁴⁶ Signed by the Congregation’s Prefect, Joseph Cardinal Ratzinger, it was published only two months after the promulgation of *Ad tuendam fidem*. Concerning the paragraph in question (the second paragraph of the formula attached to the Profession of Faith), the Commentary explains that Catholics believe certain things as a result of a

⁴⁴ *Acta et Decreta Sacrorum Conciliorum recentiorum: Collectio Lacensis VII*, Frigurgi Brissgoviae, Sumptibus Herder, 1892, 577.

⁴⁵ E. TEJERO, “The Teaching Office of the Church,” in Á. MARZOÁ – J. MIRAS – R. RODRÍGUEZ-OCAÑA (eds.), *Exegetical Commentary on the Code of Canon Law I*, Montréal – Woodbridge, Midwest Theological Forum, 2004, 33.

⁴⁶ CDF, *Doctrinal Commentary on the Concluding Formula of the Professio fidei*, 29 June 1998, in *ORE*, 15 (15 July 1998), 3-4. Cardinal Ratzinger states that the text was approved by the College of Cardinals and the pope. However, according to L. Örsy, since the *Commentary* was “not approved by the Congregation [for the Doctrine of the Faith] as a corporate body,” it has no official standing. Ratzinger agreed that the text has no binding force in a response to an article written by Örsy in *Stimmen der Zeit* in 1998. L. ÖRSY, *Receiving the Council. Theological and Canonical Insights and Debates*, Collegeville, Liturgical Press, 2009, 109 and 124.

development in the Church's understanding over the centuries. Other articles of faith have been believed all along, but only at a certain point in time is a teaching or understanding concretized and stated formally by the Roman Pontiff or college of bishops. The document provides as an example the primacy of Peter, which was believed from the beginning but defined as a divinely revealed truth only in 1870. Yet, even before that, the primacy of jurisdiction of the Roman Pontiff was held to be definitive—a true doctrine accepted into the “consciousness” of the Church.⁴⁷

Another example in the Commentary concerns the Church's teaching that ordination to the priesthood is reserved to men alone. This teaching has its roots in Scripture, has been held since the beginning, has been preserved and applied in the tradition of the Church and “has been set forth infallibly by the ordinary and universal Magisterium.” Therefore, John Paul II declared that it is to be held definitively.⁴⁸ That the Roman Pontiff stopped short of declaring this teaching to be divinely revealed does not preclude that the Church could come to understand the teaching as divinely revealed in the future.⁴⁹

Paragraph 9 of the Doctrinal Commentary further explains the difference between the first and second paragraphs appended to the Profession of Faith.

The Magisterium of the Church, however, teaches a doctrine to be *believed as divinely revealed* (first paragraph) or to be *held definitively* (second paragraph) with an act which is either *defining* or *non-defining*. In the case of a *defining* act, a truth is solemnly defined by an “ex cathedra” pronouncement by the Roman Pontiff or by the action of an ecumenical council. In the case of a *non-defining* act, a doctrine is taught *infallibly* by the Ordinary and universal Magisterium of the Bishops dispersed throughout the world who are in communion with the Successor of Peter. *Such a doctrine can be confirmed or reaffirmed by the Roman Pontiff, even without recourse to a solemn definition*, by declaring explicitly that it belongs to the teaching of the ordinary and universal Magisterium as a truth that is divinely revealed (first paragraph) or as

⁴⁷ CDF, *Doctrinal Commentary*, no. 11.

⁴⁸ “Declaramus Ecclesiam facultatem nullatenus habere ordinationem sacerdotalem mulieribus conferendi, hancque sententiam ab omnibus Ecclesiae fidelibus esse definitive tenendam.” JOHN PAUL II, Apostolic Letter *Ordinatio sacerdotalis*, 22 May 1994, in AAS, 86 (1994), n. 4.

⁴⁹ Cf. CDF, *Doctrinal Commentary*, 11. Pope Francis confirmed that the “door is closed” to women's ordination to the priesthood in an interview given during his return from Brazil to Rome after World Youth Day, 2013. “E, con riferimento all'ordinazione delle donne, la Chiesa ha parlato e dice: ‘No.’ L'ha detto Giovanni Paolo II, ma con una formulazione definitiva. Quella è chiusa, quella porta [...]” FRANCIS, *Conferenza stampa del Santo Padre Francesco durante il volto di ritorno*, 28 July 2013, http://w2.vatican.va/content/francesco/it/speeches/2013/july/documents/papa-francesco_20130728_gmg-conferenza-stampa.html (6 August 2017).

a truth of Catholic doctrine (second paragraph). Consequently, when there has not been a judgment on a doctrine in the solemn form of a definition, but this doctrine, belonging to the inheritance of the *depositum fidei*, is taught by the ordinary and universal Magisterium, which necessarily includes the Pope, such doctrine is to be understood as having been set forth infallibly. The declaration of *confirmation or reaffirmation* by the Roman Pontiff in this case is not a new dogmatic definition, but a formal attestation of a truth already possessed and infallibly transmitted by the Church.⁵⁰

Another example of a teaching that is explicitly said to be definitive is an 11 February 2005 note from the CDF reaffirming the teaching and discipline “that only priests (bishops and presbyters) are ministers of the Sacrament of Anointing of the Sick. This doctrine is *definitive tenenda*. Thus, any attempt by deacons or lay people to exercise this ministry would constitute simulation of the Sacrament.”⁵¹ The brief note is followed by a commentary signed by the prefect of the same Congregation. It explains the historical basis for the Church’s understanding that only a priest or bishop can validly administer said sacrament, noting that this question has been asked before and the response has always been the same. The Church is not making an arbitrary decision but rather is basing it in scripture and on history.⁵² One is therefore

⁵⁰ CDF, *Doctrinal Commentary*, n. 9. Words in italics in the original. A footnote included in the paragraph notes “that the infallible teaching of the ordinary and universal Magisterium is not only set forth with an explicit declaration of a doctrine to be believed or held definitively, but is also expressed by a doctrine implicitly contained in a practice of the Church’s faith, derived from revelation or, in any case, necessary for eternal salvation, and attested to by the uninterrupted Tradition [...]. Furthermore, the intention of the Ordinary and universal Magisterium to set forth a doctrine as definitive is not generally linked to technical formulations of a particular solemnity; it is enough that this be clear from the tenor of the words used and from their context.” Cf. P. HÜNERMANN – R. FASTIGGI – A. ENGLUND NASH (eds.), *Denzinger. Enchiridion symbolorum definitionum et declarationum de rebus fidei et morum. Compendium of Creeds, Definitions, and Declarations on Matters of Faith and Morals*, San Francisco, Ignatius Press, 2012, n. 3011. [Hereafter, *DS*]. All translations from Latin to English taken from this edition unless otherwise noted.

⁵¹ CDF, *Note*, 11 February 2005, in *Communicationes*, 37 (2005), 177. English translation from the Vatican website (30 July 2017). Cf. APOSTOLIC PENITENTIARY, *Address of His Eminence Card. James Francis Stafford on the Occasion of the Annual General Conference of the “Society for Catholic Liturgy,”* 21 September 2006, http://www.vatican.va/roman_curia/tribunals/apost_penit/documents/rc_trib_appen_doc_20060921_stafford-reconciliation_en.html (30 July 2017).

⁵² Not only does James state that presbyters should be sought to assist one who is sick (5, 14-15), the question was revisited several times. It was discussed by Innocent I in 416 (cf. *DS*, 216), at the Council of Florence with the bull *Exultate Deo* (22 November 1439) (*DS*, 1325), at the Council of Trent (cf. *DS*, 1697-1700) and by means of two papal documents in the eighteenth century: BENEDICT XIV, Constitution *Etsi pastoralis per gli italo greci*, 26 May 1742 (*DS*, 2524) and ID., Encyclical *Ex quo primum*, 1 March 1756, *Enchiridion delle Encicliche* 1, Bologna, Edizioni Dehoniane Bologna, 1994, 710-839.

required at the minimum to give *obsequium* to this doctrine. In keeping with c. 1371, 1°, if after a warning one continues to manifest, in an external way, disobedience to this teaching of the Church, he or she would be subject to a just penalty. Moreover, should a non-priest in his disobedience go so far as to anoint someone, he would be irregular to receive Holy Orders (c. 1041, 6°), since he would have placed an act of orders reserved to those in the order of episcopate or presbyterate while lacking that order.⁵³

3 — *Two Canons Related to c. 1371, 1°*

Besides c. 750 §2, c. 1371, 1° makes reference to two other canons. These are cc. 752 and 1364 §1.

3.1 — Canon 752

Canon 752 states: “Although not an assent of faith, a religious submission of the intellect and will must be given to a doctrine which the Supreme Pontiff or the college of bishops declares concerning faith or morals when they exercise the authentic magisterium, even if they do not intend to proclaim it by definitive act; therefore, the Christian faithful are to take care to avoid those things which do not agree with it.”⁵⁴ Religious “submission” (*obsequium*) of the intellect and will must be given to a doctrine concerning faith or morals which has been declared by the pope or college of bishops even though this declaration was not proclaimed by a definitive act. Put another way, one may not refute or contest a doctrine taught by either of the above-mentioned authorities when they teach in an authentic, but not definitive, manner.⁵⁵ This *obsequium*, the canon explains, is not an assent of faith. That is to say, one is not required to “believe” in the same way he is to believe what is contained in the Nicene Creed or in infallible statements made by the Supreme Pontiff. However, one must at least submit or adhere to the doctrine that the pope or college of bishops declares concerning faith or morals when they exercise their

⁵³ “Ad recipiendos ordines sunt irregulares: qui actum ordinis posuerit constitutis in ordine episcopatus vel presbyteratus reservatum, [...] eodem carens [...].”

⁵⁴ “Non quidem fidei assensus, religiosum tamen intellectus et voluntatis obsequium praestandum est doctrinae, quam sive Summus Pontifex sive Collegium Episcoporum de fide vel de moribus enuntiant, cum magisterium authenticum exercent, etsi definitivo actu eandem proclamare non intendunt; christifideles ergo devitare curent quae cum eadem non congruant.”

⁵⁵ Cf. L. CHIAPPETTA, *Il Codice di Diritto Canonico. Commento giuridico-pastorale* II, Roma, Edizioni Dehoniane, 1996, 664.

authentic magisterium, even if in a non-definitive manner. Finally, the faithful are also held to avoid those things that are not in accord with a doctrine issued by the pope or college of bishops.

Obsequium is difficult to translate into English.⁵⁶ The possibilities are many: submission, respect, deference, concurrence, adherence, compliance, allegiance, servility, subservience, obsequiousness, solicitude, yielding-ness, indulgence, obedience.⁵⁷ L. Chiappetta holds that *obsequium* in its fullness is more than a simple external adherence to a given doctrine. Above all, he says, what is necessary is internal adhesion, that of the intellect and the will.⁵⁸ It is more than giving the appearance or saying with one's lips that he is giving *obsequium*. However, given the requirements of c. 1321 §1 that a violation of a law is external, one who does not internally adhere to a doctrine would not face punishment so long as he does not externally manifest his lack of *obsequium*.⁵⁹

Canon 752 has as a principal font *Lumen gentium* 25, which explains that not all teachings hold the same weight. The nature of the teaching or doctrine must be considered as well as how often it is repeated. The tenor of language used also provides an indication of its import or weight. However, history proves that the Roman Pontiff rarely defines *ex cathedra* a dogma of faith.⁶⁰

⁵⁶ For an in depth study of the use of *obsequium* in Church documents, papal teachings, liturgy, etc., cf. J.M. WACHS, *Obsequium in the Church: Sacred Tradition, Second Vatican Council, 1983 Code, and Sacred Liturgy*, Montréal, Wilson & Lafleur, 2014.

⁵⁷ Cf. J.A. CORIDEN, "The Teaching Function of the Church," in J.P. BEAL – J.A. CORIDEN – T.J. GREEN (eds.), *New Commentary on the Code of Canon Law*, New York, Paulist Press, 914 [hereafter, *CLSA Comm2*]; C. LEWIS – C. SHORT, *A Latin Dictionary*, 1242.

In Italian there is a word to describe respect owed to a person of high rank or great dignity, namely, *ossequio*.

⁵⁸ "Non basta una semplice adesione esterna: è necessaria anche e soprattutto quella *interna*, dell'intelletto e della volontà." L. CHIAPPETTA, *Il Codice di Diritto Canonico* II, 9.

⁵⁹ Canon 1321 §1: "Nemo punitur, nisi externa legis vel praecepti violatio, ab eo commissa, sit graviter imputabilis ex dolo vel ex culpa."

⁶⁰ Two Marian dogmas were declared infallibly: PIUS IX, Bull *Ineffabilis Deus*, 8 December 1854, in *DS*, 2800-2804. The final paragraph states: "Therefore, if any people (which God forbid!) will presume in their hearts to think otherwise than what has been defined by Us, let them henceforth know and understand that they are condemned by their own judgment; that they have made shipwreck of their faith and defected from the unity of the Church; moreover, if they should dare to express in words or in writings, or by any other outward means, these errors that they think in their hearts, they subject themselves *ipso facto* to the penalties established by law." Likewise, PIUS XII, Apostolic Constitution *Munificentissimus Deus*, 1 November 1950, in *AAS*, 42 (1950), 753-771. Paragraph 45 states: "Hence if anyone, which God forbid, should dare willfully to deny or to call into doubt that which we have defined, let him know that he has fallen away completely from the divine and Catholic Faith." Translation from Vatican website (30 July 2017).

“The scope of the authentic magisterium of the Pope, the ecumenical council, and of the college of bishops, addressed in c. 752, is broad and much of the content of this ordinary magisterium is in fact infallible, without ever having been defined in a definitive manner.”⁶¹ This position is not universally held, however. J.A. Coriden focuses more on the non-infallible nature of the large majority of the teachings while pointing out that some authority has been mistaken in the past and likely will err again in the future. Therefore, the faithful should not be expected to give absolute or unconditional obedience to such teaching. In fact, he continues, the canon only requires a “respectful religious deference of intellect and will, and an avoidance of teachings which do not concur with it.”⁶² F. Sullivan holds that there are ways of expressing disagreement with a non-definitive pronouncement of the magisterium which “would be compatible with an attitude of *obsequium*.” As an example, he cites the possibility of internal dissent.⁶³

3.2 — Canon 1364 §1

Also referenced in 1371, 1° is c. 1364 §1, which states: “Without prejudice to the prescript of c. 194 §1, 2°, an apostate from the faith, a heretic, or a schismatic incurs a *latae sententiae* excommunication; in addition, a cleric can be punished with the penalties mentioned in c. 1336 §1, 1°, 2° and 3°.”⁶⁴

⁶¹ E. TEJERO, “The Teaching Office of the Church,” 587.

⁶² J.A. CORIDEN, “Teachings of the Pope and College of Bishops,” in *CLSA Comm2*, 917. However, another author describes well a dangerous trend: “[...] ci sembra evidente che vi sia spesso una visione troppo ‘umana’ ed ‘orizzontale’ della realtà del magistero, e più in generale, della Gerarchia e dell’intera Chiesa. Il magistero sarebbe una delle istanze che agiscono nella Chiesa, ed avrebbe un valore non essenzialmente diverso da quello delle altre voci, dei teologi o dei cristiani in generale. Con questi presupposti si arriva paradossalmente a trasformare il magistero in un’istanza piuttosto disciplinare, dal momento che sarebbe espressione della verità sostenuta da coloro che detengono il potere nella Chiesa. Facilmente si scopre il relativismo sotteso a queste impostazioni: essendo impossibile trovare una verità oggettiva, soprattutto su determinanti problemi decisivi di grande attualità, ci si dovrebbe accontentare di approssimazioni da parte di tutte le componenti del Popolo di Dio, inclusi i Pastori. La pretesa da parte di questi ultimi di offrire dei punti di riferimento definitivi viene *a priori* ritenuta infondata, e addirittura fonte d’inutile e dannosa tensione all’interno della Chiesa. La pace ecclesiale richiederebbe quindi una costante opera di relativizzazione del magistero.” C.J. ERRÁZURIZ MACKENNA, “Unità e tipologia del magistero nella Chiesa,” in *Ius Ecclesiae*, 11 (1999), 431.

⁶³ Cf. F. SULLIVAN, “The Response Due to the Non-Definitive Exercise of Magisterium (Canon 752),” in *Studia Canonica*, 23 (1989), 281.

⁶⁴ “Apostata a fide, haereticus vel schismaticus in excommunicationem latae sententiae incurrit, firmo praescripto can. 194, §1, n. 2; clericus praeterea potest poenis, de quibus in can. 1336, §1, nn. 1, 2 et 3, puniri.”

Canon 751 gives definitions of these delicts.⁶⁵ Heresy is the obstinate (*pertinax*) denial or obstinate doubt after the reception of baptism of some truth which is to be believed by divine and Catholic faith. Note is to be made of the word *divina*, which is not found in c. 1371, 1°. However, *pertinaciter* is contained in c. 1371, 1° as it is in c. 751. To be culpable of heresy the accused, having been warned, must continue in his denial or obstinate doubt of a truth to be believed by divine and Catholic faith. The correction should come from one with “credibility in matters of the Church’s faith,” including the CDF.⁶⁶

Apostasy is defined as the total repudiation of the Christian faith. This complete rejection, it is to be noted, is not only of the Catholic faith but also of the Christian faith.⁶⁷ Therefore, any of the faithful who denies beliefs found in Catholicism (the Assumption or Immaculate Conception of the Blessed Virgin Mary, for example), while retaining beliefs central to all Christians, would be in the category of heretic but would not be an apostate.

Schism is defined in c. 751 as the withdrawal of submission (*subiectionis detrectatio*) to the Supreme Pontiff or from communion with the members of the Church subject to him. One who obstinately refuses to submit to the authority of the pope when he speaks as head of the Church falls into schism. However, when the pope speaks as a private person, people are free to disagree with his conclusions.⁶⁸

Canon 1364 §1 declares that apostates, heretics and schismatics incur a *latae sententiae* excommunication and that, if the offender is a cleric, he may be punished with penalties mentioned in c. 1336 §1, 1°-3° (referred to above).

⁶⁵ “Dicitur haeresis, pertinax, post receptum baptismum, alicuius veritatis fide divina et catholica credendae denegatio, aut de eadem pertinax dubitatio; apostasia, fidei christianae ex toto repudiatio; schisma, subiectionis Summo Pontifici aut communionis cum Ecclesiae membris eidem subditis detrectatio.”

⁶⁶ E. TEJERO, “The Teaching Office of the Church,” 37. Cf. JOHN PAUL II, Apostolic Constitution *Pastor bonus*, 28 June 1988, in AAS, 80 (1988), 841-930; specifically, articles 48-55.

⁶⁷ Therefore, one who has been validly baptized into the Roman Catholic Church but later convinces himself that God does not exist should identify himself as an apostate as well as an atheist.

⁶⁸ So grave does the legislator consider apostasy, heresy and schism that he put safeguards in place. For example, a man who has committed any of the above delicts would be irregular to receive orders (c. 1041, 2°) while a guilty cleric would be irregular to exercise orders received, provided the delict is public (c. 1044 §1, 2°). The irregularities are reserved to the Apostolic See (c. 1047). If the delict has been brought to the external forum, the CDF would be competent to remit the irregularities while, if occult, the Apostolic Penitentiary should be approached. Cf. JOHN PAUL II, Apostolic Constitution *Pastor bonus*, art. 52. Canon 1047 states only that dispensation from all irregularities brought to the judicial forum is reserved to the Apostolic See. The competent dicastery, subject to change, is not mentioned in the *CIC*.

Yet there is a difference between being a heretic and not being in full communion with the Church. While the heretic “places himself outside of the Church in an absolute and full manner” due to his denial of a divinely revealed truth, one who denies a truth contained in the second paragraph, while not putting himself completely outside of the Church, “certainly cannot be considered to be in full communion.” Though in grave error, he cannot be considered a heretic.⁶⁹

Competent ecclesiastical authority has the duty to correct those in error not only for the salvation of their own souls but also for that of others who might unwittingly follow a heretic, schismatic or apostate down the wrong path. When the defector from the faith is a cleric, the chance is all the greater that others will follow the person, especially if he is well known and respected.

4 — *Analysis of Canon 1371, 1°*

Having studied the factors involved in the decision to modify c. 1371, 1° along with an examination of the canons referred to in it, we can now examine the canon itself in greater depth. To recap, it reads:

The following are to be punished with a just penalty: 1° a person who, apart from the case mentioned in can. 1364 §1, teaches a doctrine condemned by the Roman Pontiff, or by an Ecumenical Council or obstinately rejects the doctrine mentioned in can. 750 §2 or in can. 752 and, when warned by the Apostolic See or by the Ordinary, does not retract.⁷⁰

Iusta poena puniatur: 1°: qui, praeter casum de quo in can. 1364 §1, doctrinam a Romano Pontifice vel a Concilio Oecumenico damnatam docet vel doctrinam, de qua in can. 750 §2 vel in can. 752, pertinaciter respuit, et ab Apostolica Sede vel ab Ordinario admonitus non retractat.

Six terms in this canon merit particular explanation in view of properly understanding its meaning and applying it in ecclesial practice. These are condemned doctrine (*doctrina damnata*), Roman Pontiff (*Romanus Pontifex*), Ecumenical Council (*Concilium Oecumenicum*), obstinately rejects (*pertinaciter respuit*), having been warned (*admonitus*), and does not retract (*non retractat*).

⁶⁹ Cf. B. FERME, “*Ad tuendam fidem*: Some Reflections,” 594.

⁷⁰ Translation of this canon is taken from CCLA, 1068. This translation differs from that which appears in CANON LAW SOCIETY OF AMERICA, *Code of Canon Law Latin-English Edition*, 1999, as regards the word “praeter,” which the latter renders “in addition to” and the former, “apart from.”

4.1 — *Doctrina damnata*

Damnata (condemned, found guilty) modifies *doctrina* (doctrine) in the canon. There is a difference between the doctrine to which this canon refers and doctrine condemned as formally heretical. The doctrine considered in c. 1371, 1° is not considered part of the deposit of faith nor would it have been proclaimed in an infallible manner—that is to say, with the required formalities.⁷¹ A delict foreseen by this canon would be considered less serious than that of heresy, apostasy or schism.

Doctrine foreseen to be condemned by this canon is authoritative magisterial teaching, “not simply a private expression of a theological opinion by a bishop.”⁷² The canon also includes the denial of truths set forth in the second paragraph of the *Professio fidei*. One denying a truth of this level would not be considered a heretic, though would be punishable if he did not retract such a denial after having been warned.⁷³ Section 1.4.2 above, examining Cardinal Ratzinger’s analysis of *Ad tuendam fidem*, provides examples of doctrine that one may not obstinately reject.⁷⁴ One who is obstinate in such a rejection would be subject to disciplinary measures.

⁷¹ *Pastor aeternus* states: “The Roman Pontiff, when he speaks *ex cathedra*, that is, when, acting in the office of shepherd and teacher of all Christians, he defines, by virtue of his supreme apostolic authority, a doctrine concerning faith and morals to be held by the universal church, possesses through the divine assistance promised to him in the person of blessed Peter, the infallibility with which the divine Redeemer willed his church to be endowed.” VATICAN COUNCIL I, Dogmatic Constitution *Pastor aeternus*, 18 July 1870, in *DS*, 3074.

⁷² T.J. GREEN, “Delicts Against Ecclesiastical Authorities and the Freedom of the Church,” in *CLSA Comm2*, 1581. An example can be taken from a paragraph of Pope Francis’ first apostolic exhortation that speaks to matters concerning the economy. “Some people continue to defend trickle-down theories which assume that economic growth, encouraged by a free market, will inevitably succeed in bringing about greater justice and inclusiveness in the world. This opinion, which has never been confirmed by the facts, expresses a crude and naïve trust in the goodness of those wielding economic power and in the sacralized workings of the prevailing economic system. Meanwhile, the excluded are still waiting.” FRANCIS, Apostolic Exhortation *Evangelii gaudium*, 26 November 2013, Città del Vaticano, Libreria Editrice Vaticana, 54. If the case be that the Holy Father intends to merely express his opinion, one would be free to agree or disagree with the statement.

⁷³ Ferme holds that one who denies such truths “certainly sins grievously against the faith and is in grave error.” B. FERME, “*Ad tuendam fidem*: Some Reflections,” 595.

⁷⁴ One author holds that c. 1371, 1° is more concerned with faithfulness to the faith rather than disobedience to Church authority: “Benché si tratti di una disubbidienza all’autorità, non può dimenticarsi che l’autorità appare qui quale organo del magistero ecclesiastico al servizio dell’interpretazione autentica della rivelazione divina. Di conseguenza, il problema posto non concerne tanto l’obbedienza all’autorità quanto la fedeltà alla stessa fede (senza che si tratti di eresia in senso stretto). Ne consegue che ci sembra più espressiva la sistematica

4.2 — *Romanus Pontifex*

The term *Romanus Pontifex* is found in many places in the Code but is treated specifically in Book II, Part II, *De Ecclesiae constitutione hierarchica*. Section I is entitled *De suprema Ecclesiae auctoritate*. The first six canons in this section concern the successor of Peter. Canon 331 attributes various titles to the Roman Pontiff: bishop of the Roman Church, head of the college of bishops, the Vicar of Christ and pastor of the universal Church on earth. By virtue of his office, the Roman Pontiff possesses supreme, full, immediate and universal Ordinary power in the Church, which he may always freely exercise.

The pope possesses *ordinary power* by virtue of his office, not as a physical person but rather as holder of the highest office of governance in the Church. Canon 333 §1 states that the Roman Pontiff obtains the primacy of ordinary power over all particular churches and groups of them by virtue of his office. He does not possess this power as a private person or one of the faithful. With the resignation of Pope Benedict XVI, the necessity of making such a distinction has become more evident.⁷⁵

The power of the Roman Pontiff is *supreme*. He is subordinate to no other human power “be it ecclesiastical or temporal, and therefore enjoys the highest rank in the human order.”⁷⁶ Examples may be found in c. 333 §3, which says that a sentence or decree of the Roman Pontiff admits of no appeal or recourse, while c. 1404 states, “Prima Sedes a nemini iudicatur.” The pope is, moreover, the “supreme judge for the whole Catholic world” (c. 1442). This fact is further illustrated in c. 1372, which establishes penal sanctions against anyone “who appeals from an act of the Roman Pontiff to an Ecumenical Council or to the College of Bishops.”

del Codice pio-benedettino a questo riguardo.” C.J. ERRÁZURIZ MACKENNA, “La protezione giuridico-penale dell’autenticità della fede. Alcune riflessioni sui delitti contro la fede,” in *Monitor Ecclesiasticus*, 114 (1989), 122-123. Ratzinger’s successor at the CDF said the following, long before his nomination as prefect of that dicastery: “Catholic theology does not recognize the right to dissent, if by that we mean adopting conclusions which are contrary to the clear teachings of the authoritative, infallible magisterium and which are presented to the public in such a way as to constitute equivalently an alternative personal magisterium.” W.J. LEVADA, “Dissent and the Catholic Religion Teacher,” in *Origins*, 16 (1986), 197.

⁷⁵ Cf. BENEDICT XVI, *Declaratio Summi Pontificis de muneris Episcopi Romae, Successoris Sancti Petri abdicatione*, 10 February 2013, in AAS, 105 (2013), 239-240; in *Communicationes*, 45 (2013), 44-45. The Pope verbally expressed his intention to resign on the following day. Cf. G. GHIRLANDA, “Cessazione dall’ufficio di Romano Pontefice,” 2 March 2013, in *La Civiltà Cattolica*, 164 I (2013), 445-462.

⁷⁶ E. MOLANO, “The Roman Pontiff,” in *CCLA*, 594.

The Supreme Pontiff also enjoys *full* power. By full is meant all the power needed to govern the Church “in all orders and spheres of the ecclesiastical realm,” including all powers of orders and governance exercised in the *munus sanctificandi*, *munus docendi* and *munus regendi*. He has full power of governance—legislative, executive and judicial (c. 135 §1).⁷⁷ *Christus Dominus* 2 says that the power enjoyed by the Roman Pontiff is for the care of souls. He is to provide “for the common good of the universal Church and for the good of the individual churches.”⁷⁸ The power he enjoys, then, is to serve the Church; the pope must respect the divinely instituted Church, which includes “faith, the sacraments and the ecclesiastical system itself, with the existence of the episcopate, of particular churches, the rights of the faithful, etc.”⁷⁹ Therefore, the pope is subject to some limitations.⁸⁰

The pope’s power is also *immediate*. The pope has no need for any permission or authorization from a bishop or Ordinary to exercise his power in relation to the faithful of a diocese or any juridical or physical person in the Church. The faithful also have the right to approach the pope directly. This right may be exercised, for example, during a trial (c. 1417 §1). The pope may reserve cases to himself (cc. 1405 §1, 1°, 4° and 1444 §2) as well as other juridical matters, for example, the dispensation from the obligation of celibacy (c. 291).

The Roman Pontiff’s power is *universal*. He may exercise his power in all areas of the Church provided they “fall within the ecclesiastical order.” Areas include territories, persons or matters.⁸¹

The power of the Roman Pontiff *may always be freely exercised*. “*Quam semper libere exercere valet*” means that the pope is not impeded from exercising his power at any time and in any place. The bishops have the divine

⁷⁷ Cf. *ibid.*

⁷⁸ VATICAN COUNCIL II, Decree *Christus Dominus*, 28 October 1965, in *AAS*, 58 (1966), n. 2.

⁷⁹ E. MOLANO, “The Roman Pontiff,” in *CCLA*, 594-595.

⁸⁰ In 1998 the CDF explained that there is a limit to the power enjoyed by the pope, especially when it comes to matters of a divine nature. “The Roman Pontiff—like all the faithful—is subject to the Word of God, to the Catholic faith, and is the guarantor of the Church’s obedience; in this sense he is the *servus servorum Dei*. He does not make arbitrary decisions, but is spokesman for the will of the Lord, who speaks to man in the Scriptures lived and interpreted by Tradition; in other words, the *episkope* of the primacy has limits set by divine law and by the Church’s divine, inviolable constitution found in Revelation. The Successor of Peter is the rock which guarantees a rigorous fidelity to the Word of God against arbitrariness and conformism: hence the martyrological nature of his primacy.” CDF, “The Primacy of the Successor of Peter in the Mystery of the Church,” in *ORE*, 18 November 1998, n. 7.

⁸¹ E. MOLANO, “The Roman Pontiff,” in *CCLA*, 595.

law right and power to govern their own dioceses (c. 381, §1). However, there are times when the Roman Pontiff concludes that he must intervene for the good of the Church. At times, he will decide to remove a bishop or encourage resignation. He might choose to appoint a coadjutor bishop equipped with full faculties to govern during the *sede plena*.

4.3 — *Concilium Oecumenicum*

A third significant term in c. 1371, 1° is *Concilium Oecumenicum*. While it is commonly accepted that twenty-one councils can be considered to be ecumenical,⁸² neither the 1917 Code nor the 1983 Code provides a precise definition of what is meant by “ecumenical council.” In the current Code, nine canons discuss various aspects of such a council (especially cc. 337-341). Among these are the role and power of the college of bishops (c. 337 §1); that an ecumenical council may be convoked only by the Roman Pontiff (c. 338 §1); the infallibility enjoyed by the college of bishops in an ecumenical council (c. 749 §2); and the delict of making recourse against the act of the Roman Pontiff to an ecumenical council (c. 1372). Canons 222-229 of *CIC/17* also addressed the topic, but none provides a definition of what is meant by “ecumenical council.”

Lumen gentium 22 provides some insight when elaborating on the role of the college of bishops. It points out “the very ancient practice whereby bishops duly established in all parts of the world were in communion with one another and with the Bishop of Rome in a bond of unity, charity and peace.”⁸³ It states as well that the councils were assembled together and that the “more profound issues were settled in common,” after the opinion of many of the participants had been considered.⁸⁴ Still, no precise definition is provided.

Tanner, while giving a comprehensive account of these councils in his various writings, also does not provide a definition of ecumenical council.⁸⁵

⁸² The councils begin with Nicaea I in 325 and go to the Second Vatican Council in 1962. The twenty-one councils are considered ecumenical or general councils by the Roman Catholic Church, while “most other churches” consider the first seven councils to be ecumenical. N. TANNER (ed.), *Decrees of the Ecumenical Councils* I, London, Sheed and Ward; Washington, Georgetown University Press, 1990, vii.

⁸³ VATICAN COUNCIL II, Dogmatic Constitution *Lumen gentium*, 21 November 1964, in AAS, 57 (1965), n. 22. Translations taken from the Vatican website (1 August 2017).

⁸⁴ *LG*, nn. 25-27.

⁸⁵ Cf. N. TANNER, *The Councils of the Church, A Short History*, New York, Crossroad Publishing Company, 2001; and ID., *Decrees of the Ecumenical Councils* I-II.

Gerosa specifies that there is a difference between the college of bishops and an ecumenical council inasmuch as the ecumenical council “is only the solemn form with which the college of bishops exercises its supreme power in the Church.” But, the exercise of this supreme power can take place outside of a council or in a non-solemn way while still remaining collegial in a strict sense.⁸⁶ Ghirlanda says that the college of bishops originates from divine law while an ecumenical council is only of ecclesiastical law. He defines the ecumenical council as “a legitimate reunion of all bishops and of other pastors, who represent the universal Church and who are convoked by the Roman Pontiff, who, with the approval of the Roman Pontiff, deliberate on doctrinal, disciplinary and pastoral questions concerning the entire Church, exercising collegiality in a strict sense in the solemn exercise of full and supreme collegial power on the entire Church.”⁸⁷

What is important for the purpose of interpreting the canon is that one who teaches a doctrine condemned by any of the twenty-one ecumenical councils, and who does not retract the teaching after a warning, is to receive a just penalty. By way of example, we consider two of the forty-five articles of John Wyclif condemned at the Council of Constance in Session VIII (4 May 1415). Article 41 states, “it is not necessary for salvation to believe that the Roman church is supreme among the other churches.”⁸⁸ Since this was condemned, one who teaches this to be true (or rejects the condemnation of the Council) would be subject to a just penalty if he persists in his rejection. The seventeenth article states, “tithes are purely alms, and parishioners can withhold them at will on account of their prelates’ sins.”⁸⁹ A person could also be held accountable by competent authority by means of a warning and later a just penalty if the one who teaches this condemned doctrine continues teaching it.

⁸⁶ Cf. L. GEROSA, *Canon Law*, New York, Bloomsbury Academic, 2002, 239.

⁸⁷ “Esso si può definire la legittima riunione di tutti i vescovi e di altri pastori, rappresentanti la Chiesa universale, convocati dal Romano Pontefice, i quali, con l’approvazione di questi, deliberano su questioni dottrinali, disciplinari e pastorali riguardanti tutta la Chiesa, attuando la collegialità in senso stretto nell’esercizio solenne della potestà collegiale piena e suprema su tutta la Chiesa.” G. GHIRLANDA, *Il diritto nella Chiesa mistero di comunione. Compendio di diritto ecclesiale*, Roma, Gregorian and Biblical Press, 2015, 654, n. 711.

⁸⁸ N. TANNER (ed.), *Decrees of the Ecumenical Councils* I, 410, 413. Under the heading “Sententia condemnatoria articulorum Ioannis Wicleff,” number 41 says: “Non est de necessitate salutis credere Romanam ecclesiam esse supremam inter alias ecclesias.” This and the following English translation are taken from Tanner.

⁸⁹ N. TANNER (ed.), *Decrees of the Ecumenical Councils* I, 410, 412. Article 18 states, “Decimae sunt purae eleemosynae, et parochiani possunt propter peccata suorum praelatorum ad libitum suum eas auferre.”

4.4 — *Pertinaciter respuit*

Respuit may mean reject, spit, spew out, turn away, repel, reject, disdain, spurn or refuse. It is usually translated into English as “reject” or “retract.” Yet the other possibilities are telling. They indicate that the rejection is a strong one. In the Italian translation on the Vatican website, one finds *respingere*.

The word *pertinaciter* has different possible meanings, among them tenaciously, obstinately, stubbornly, determinedly, through thick and thin. These are strong words, indicating more than a lack of humility or openness to correction but almost a determination to be closed to correction. The adverb *pertinaciter* modifies the verb *respuit*. A person who rejects doctrine specified in the canon after having been warned is to be punished.

One author concludes that stubborn rejection of a doctrine is considered more than a simple delict but rather a continual delict, given the plurality of successive actions (rejections in this case) on the part of the offender.⁹⁰ In other words, until the person retracts or withdraws the rejection after having received a warning, the delict remains.

4.5 — *Admonitus*

There are different words to express a warning. *Admonitus* is used in c. 1371, 1° while we find *monitum* in c. 1371, 2°. *Admonere* means to admonish, remind, prompt, suggest, advise, raise, persuade, urge, warn, caution, bring to one’s mind, recall a thing to memory. It has a wider variety of possible definitions than *monitum* (a reminder, warning or admonition).⁹¹ Considering its context, it makes sense to translate *admonitus* as “having been warned” since a warning is understood to be formal in nature: given in written form, presented formally to the accused and explaining the consequences of committing the same or similar violations in the future.

Either the Apostolic See or the Ordinary may first attempt to persuade a person who appears to have rejected a teaching to reconsider his or her position. Similarly, the same competent authority can bring to the mind of another that he is erring in a certain position he is taking. The person may not be aware that the Roman Pontiff has condemned a certain doctrine, for

⁹⁰ “Se puede razonablemente deducir que el tipo delictivo que estudiamos, como todos los incluidos en ese mismo c. 1371, 1°, no es un delito simple (en el sentido de que se dé una unidad de acción y de ley violada) sino un delito continuado, compuesto por una pluralidad de acciones sucesivas, pero que tienen un carácter homogéneo.” J. BERNAL, “Protección penal de las verdades propuestas por el magisterio,” in *Fidelium Iura*, 9 (1999), 127.

⁹¹ C. LEWIS – C. SHORT, *A Latin Dictionary*, 41-42; 1161.

example, or that the magisterium of the Church has definitively proposed something relative to the doctrine of faith or morals.

It would seem responsible for lower authority to engage in correction of some sort when appropriate. For example, if the head of the theology department discovers through various conversations with a professor that said professor does not believe that Mary was conceived without sin or assumed body and soul into heaven, he would do well to challenge the professor in fitting ways so that the erring professor might come to an accurate understanding of Church teachings. From a Christian and practical point of view, to approach the matter in a reconciliatory way from the outset is advisable.⁹² Moreover, the legislator recommends using various methods for avoiding trials (c. 1713).⁹³

4.6 — *Retractere*

Retractere means to undertake anew, draw back, be reluctant, reconsider, withdraw, take in hand again, revise, examine again, undertake anew, retract. It is translated as “retract” in English translations of the Code. The canon says that if the accused does not retract (*non retractat*) a statement or teaching that falls into the categories addressed by the canon, he is to receive a just penalty.⁹⁴ The law requires, however, that the authority must first consider whether “fraternal correction, rebuke, or some other means of pastoral solicitude cannot sufficiently repair the scandal, restore justice, and reform the offender” (c. 1341).

In the 1997 document entitled *Agendi ratio in doctrinarum examine*, the CDF published its procedures for the examination of a person’s possibly erroneous writings. The suspect teaching is discussed first in a *congresso* of the Congregation. If the members judge that the author’s writings contain erroneous propositions and/or dangerous opinions, the case is normally submitted to the Holy Father, after which time the findings are explained to the author, usually by letter. On the list of findings are the author’s propositions that have been deemed objectionable. The author is given three months

⁹² Cf. Mt 18:15; 2 Th 3:15; 1 Th 5:14; Ga 6:1.

⁹³ Canon 1713: “Ad evitandas iudiciales contentiones transactio seu reconciliatio utiliter adhibetur, aut controversia iudicio unius vel plurium arbitratorum committi potest.”

⁹⁴ In 2011, a study was undertaken in regards to various matters concerning priests in Australia. It concluded that 50% of priests are uncertain about the authority of the pope and many fundamental moral issues such as divorce, abortion and homosexuality. Many priests who dissent, in fact, have little knowledge of official church teachings. M. INTROVIGNE, “La crisi del clero cattolico. Problemi e prospettive,” in *Sacrum Ministerium*, 18 (2012), 105. The author cites C. MCGILLION – J. O’CARROLL, *Our Fathers. What Australian Catholic Priests Really Think about Their Lives and Their Church*, Mulgrave, Vic, John Garratt, 2011.

to respond to the contested propositions. The Congregation then considers his response in some forum.⁹⁵

The author's response may be such that the Congregation is satisfied with the explanation and requires no changes or further explanations to be made. On the other hand, the author may provide no response, or the response he offers is not considered satisfactory. If the author has not corrected the errors "in a satisfactory way and with adequate publicity," and he is found guilty of the offense of heresy, apostasy or schism, the Congregation then declares and confirms the *latae sententiae* penalties incurred, which does not admit of hierarchical recourse.⁹⁶

For an author to correct errors in a satisfactory way means that his explanation must be in accord with the established teaching of the Church. Moreover, "adequate publicity" must be given to these corrections. In other words, it would not be acceptable for his retraction or clarification to take place in secret or be addressed merely to the CDF. If the teaching was widely diffused, for example in a book or a periodical, he would be required to correct the error in a future edition of the book. If the teaching was limited to course notes destined for theology students, those who were the recipients of the erroneous teachings would need to be notified of the author/professor's revised understanding.⁹⁷

Conclusion

The two sections of canon 1371 are considered delicts against ecclesiastical authorities. The first section of the canon regards the authority of the authentic magisterium and calls for a just punishment to be inflicted upon one who teaches a condemned doctrine or rejects other doctrine and, after a warning, continues in error. Effectively, there are three distinct delicts in this

⁹⁵ Cf. CDF, *Agendi ratio in doctrinarum examine*, 29 June 1997, in AAS, 89 (1997), arts. 8-22. If the author fails to respond, he is usually contacted a second time. If he fails to respond even to the second letter, the case moves forward just the same.

⁹⁶ Article 28. "Si Auctor significatos errores non correxerit modo debito et adaequata divulgatione, atque Sessio Ordinaria concluderit ipsum incurrere in delictum haeresiae, apostasiae aut schismatis, tunc Congregatio procedit ad declarandas poenas *latae sententiae* ab eodem contractas; adversus hanc declarationem recursus non admittitur." Article 29. "Si Sessio Ordinaria pro comperto habet errores doctrinales exstare, contra quos poenae *latae sententiae* non praevidentur, Congregatio procedit ad normam iuris sive communis sive proprii." Pope John Paul II approved articles 28-29 *in forma specifica*.

⁹⁷ The above-mentioned CDF document is in relation to matters that would fall under c. 1371, 1° and to those addressed in c. 1364 §1.

canon involving obstinate persistence in doctrinal error: (1) teaching a doctrine condemned by the Roman Pontiff or an ecumenical council; (2) obstinately rejecting a definitively declared doctrine as defined by c. 750, §2; and (3) obstinately rejecting another doctrine of the authentic magisterium as defined by c. 752. As a rule, this canon would tend to be invoked upon clerics or professed religious, but with the increased number of lay people holding teaching positions in departments of theology, competent authority might find itself having to address matters of doctrinal concern also with lay teachers and ultimately invoking this canon on them. Also, the Apostolic See could punish a cardinal or bishop for persistent disobedience.

Before punishment can be inflicted, a warning must first be given. By definition, one cannot be pertinacious or contumacious the first time he or she does something wrong. His erroneous ways need to be pointed out to him, in writing for juridical certainty, and he is to be given an opportunity to reform. It is only when no reform is forthcoming that one would be subject to a just penalty.

While crimes against morals can never be condoned and must be properly punished, those against the faith can have equally grave or even worse consequences. Faith is important. What we believe matters. Those who have been educated for years in the area of theology, such as priests, have the obligation to pass on authentic doctrine correctly and to refrain from skewing it. It is a canonical crime to teach a doctrine condemned by the Roman Pontiff or an ecumenical council or to reject doctrine proposed definitively by the magisterium of the Church concerning faith and morals (cf. c. 750 §2). Moreover, “religious submission of the intellect and will” must be given to doctrines of the pope or college of bishops when either exercises his/its authentic magisterium (c. 752). Therefore, the competent ecclesiastical authority is required to safeguard the faith, taking the steps needed to prevent confusion, mitigate damage or limit scandal. The bishop or other authority could help *prevent* the diffusion of wrong teaching by being clear that he intends to closely monitor what is being taught in Catholic schools and from the pulpit; he could *mitigate* damage when he acts quickly and fairly; finally, he could *limit* scandal when he makes public his findings, informing the faithful and others where the Church stands on matters of faith and morals.

It is fitting to close our study with two quotes from writings of one of the most influential theologians of our age, Joseph Ratzinger. The first passage is from an insightful article written in 1965. He calls for authentic soul-searching on the part of anyone who is drawn to be critical of Church teachings.

What then should the Christian's attitude toward the living Church be? Should he criticize her in order to purify her? Or should he be unquestioningly obedient because of her divine mission? We might reply that one

should love the Church and all else will follow from the logic of love itself. Only love can decide whether it is better to speak or to remain silent, to accept without murmur or to struggle for what is right with the zeal of faith. The theologian, however, would like to delve a little more deeply into the meaning of “*sentire Ecclesiam*,” although in a concrete situation the individual’s faith, hope and love come into play and cannot be reduced to a truly objective norm.

One who feels impelled to a critical witness should ponder several factors. He must ask himself whether he has the necessary certitude to justify his position, and he must test himself the more carefully, the higher the theological certitude of the matter which he intends to criticize. It is obvious that every criticism of a statement properly of the faith is doomed, but it is also clear that every statement that is lower in the scale of certitude is alterable and able to be criticized. Nevertheless, before criticizing such pronouncements, the Christian must take a critical attitude toward himself. In these days of relativism and skepticism, it is very wholesome to have amid the chaos of opinion an authority that calls us not to discuss, but to listen and obey. Again the critic must have regard for his weaker brethren in the faith, for the contemporary world, and for the weakness of his own faith. For his own faith can easily be lost if he withdraws behind the barriers of criticism and ends in the resentment of the misunderstood.⁹⁸

Some forty-seven years later, Ratzinger (as Pope Benedict) said the following at what would be his final Chrism Mass homily.

Recently a group of priests from a European country issued a summons to disobedience, and at the same time gave concrete examples of the forms this disobedience might take, even to the point of disregarding definitive decisions of the Church’s Magisterium, such as the question of women’s ordination, for which Blessed Pope John Paul II stated irrevocably that the Church has received no authority from the Lord. Is disobedience a path of renewal for the Church? We would like to believe that the authors of this summons are motivated by concern for the Church, that they are convinced that the slow pace of institutions has to be overcome by drastic measures, in order to open up new paths and to bring the Church up to date. But is disobedience really a way to do this? Do we sense here anything of that configuration to Christ which is the precondition for all true renewal, or do we merely sense a desperate push to do something to change the Church in accordance with one’s own preferences and ideas?⁹⁹

⁹⁸ J. RATZINGER, “Frank Witness and Docile Obedience,” in *Theology Digest*, 13 (1965), 104-105.

⁹⁹ BENEDICT XVI, Homily *In Missa Chrismali*, 5 April 2012, in AAS, 104 (2012), 331. Translation from the Vatican website (August 2017).

THE MERGER OF PARISHES AND THE CLOSURE OF CHURCHES: LESSONS LEARNED FROM A BISHOP'S PERSPECTIVE*

BRIAN DUNN^{T**}

SUMMARY — A contemporary issue affecting many dioceses is the need to merge parishes and to close churches. This occurs due to a decline in the number of parishioners, a shortage of resources and a shortage of priests. The Holy See has provided guidelines in dealing with these mergers and closures and has outlined the processes required for the Modification of Parishes, the Closure or Relegation of Churches to Profane but not Sordid Use, and the Alienation of the Same. This article provides some observations on these processes in light of rotal jurisprudence, and the author offers a reflection on his own experience as he has been involved in mergers and closures in the past eight years in the Diocese of Antigonish. The author examines the processes involved, provides some practical experience about the use of these processes and offers some advice from his experience.

RÉSUMÉ — La nécessité de fusionner ou de fermer des églises est une question contemporaine affectant plusieurs diocèses. Ceci est dû à la baisse du nombre de paroissiens, ainsi qu'au manque de ressources et de prêtres. Le Saint Siège a publié des directives pour les fusions et les fermetures, et a exposé des Lignes directrices sur les procédures requises pour la modification des paroisses, la fermeture ou la réduction des églises à un usage profane qui ne soit pas inconvenant, et à l'aliénation de ces dernières. Cet article présente des observations sur ces procédures à la lumière de la jurisprudence rotale et l'auteur offre une réflexion basée sur son expérience personnelle puisqu'il a été impliqué dans des fusions et des fermetures depuis les huit dernières années dans le Diocèse d'Antigonish. L'auteur examine les procédures utilisées, fournit une expérience pratique sur l'usage de ces procédures et offre des conseils basés sur son expérience.

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Introduction

For the past thirty years or so, dioceses throughout the world have been engaged in discussions concerning the merger of parishes and the closure of churches. The Archdioceses of Detroit, Chicago, New York, Boston, and the Diocese of Cleveland have all consolidated their parishes and have closed many churches. In Canada, in dioceses throughout the provinces of New Brunswick, Quebec,¹ Nova Scotia, Ontario, and some western provinces, the experience of parish merger and church closure has become more frequent. This trend has arisen for a variety of reasons. In some instances, there is a number of parishes in close proximity to one another, sometimes the remnant of ethnic and national parishes established during the height of immigration from Europe in the late nineteenth century. As well, parishioners have moved to the suburbs, and struggling urban congregations shoulder the financial burden of keeping large church structures going with very limited resources. In other areas, rural parishes struggle when people move from the rural area to the larger urban area, especially in search for work. Furthermore, the shortage of clergy is leading to the consolidation or merger of some parishes in an effort to organize pastoral care more effectively.

In the Diocese of Antigonish, thirty-two parishes were merged, and the same number of churches were closed since 2007. Two-thirds of these closures were the result of mergers of parishes, especially in larger areas where there was an abundance of churches. A few others involved churches that were used infrequently. Some of these rural churches had a small number of parishioners, and these parishioners had access to other churches.

In the midst of all these mergers and closures in the Diocese of Antigonish, some parishioners chose to vindicate their rights and seek recourse to the Congregation for the Clergy on five occasions and on one occasion sought further recourse to the Apostolic Signatura. The decisions from the Holy See on these recourses have been issued and contribute to the lessons learned from these closings. Moreover, over the past few years, other decisions from the Congregation for the Clergy and the Apostolic Signatura have been publicized and have contributed to a growing awareness of the jurisprudence of the Roman Curia in relation to the merger of parishes and the closure of churches.² In this study, I want to focus on the lessons learned

¹ Alan HUSTAK, "Cash Crunch Puts Forty Percent of Montreal's English Parishes in Jeopardy," *The Catholic Register*, 17 November 2016, at <https://www.catholicregister.org/item/23608-cash-crunch-puts-40-per-cent-of-montreal-s-english-parishes-in-jeopardy>.

² See CONGREGATION FOR THE CLERGY, Decree, 1 March 2012, in *Canon Law Society of Great Britain and Ireland Newsletter*, 170 (June 2012), 19-22 (=CONG. CLERGY., Decree, 1 March

from the perspective of a diocesan bishop, especially from my experience in the Diocese of Antigonish and my review of some of the jurisprudence involved. I will briefly outline the procedures involved in the merger of parishes and the closure of churches and highlight some of the lessons learned as a result of my experience with the procedures involved. Finally, I will conclude with some recommendations.

1 — *Distinction between a Parish and Parish Church*

One of the first lessons learned was the importance of the distinction between a parish and the parish church. People often use the expression *parish* and *church* interchangeably, but they are very distinct realities, especially from a canonical perspective. The closing, consolidation, or other changes in a parish is a different canonical process from the process required for relegating a church building to profane use. The 1917 *Code of Canon Law* in c. 216 understood a parish as a territorial district of a diocese, with its own proper church and a determined people, with its proper pastor and as the source of the priest's financial support (cc. 1409–1488). However, the Second Vatican Council shifted the focus, emphasizing that the parish is understood primarily in terms of a community of people. “A parish is a definite community of the Christian faithful established on a stable basis within a particular church” (c. 515, §1). *Sacrosanctum concilium*, the first document from the Council, highlighted the fact that the first characteristic of a parish would no longer be that of geography, a piece of territory in a diocese, but a group of faithful in a particular church, a group of worshipping Christians in communion with their bishop led by a pastor representing the

2012); John JUKES, “Canonical Reflections on the Closure of a Church,” in *Canon Law Society of Great Britain and Ireland Newsletter*, 161 (2010), 30-34; Nicholas SCHÖCH, “Relegation of Churches to Profane Use (c. 1222, §2): Reasons and Procedure,” in *The Jurist*, 67 (2007), 485-502 (= SCHÖCH, “Relegation of Churches”); SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, 1. Definitive sentence of the College of Judges, 21 May 2011, prot. no. 41719/08 CA; ID., Definitive sentence of the College of Judges, 21 May 2011, prot. no. 42278/09 CA; ID., Decree of the Prefect, 8 November 2011, prot. no. 44426/10 CA; ID., Decree of the Congresso, 25 May 2012, prot. no. 46628/12 CA; Kurt MARTENS, “Brief Note Regarding the Reconfiguration of Parishes and the Relegation of Churches to Profane Use,” in *The Jurist*, 73 (2013), 597-643; William L. DANIEL (ed.), *Ministerium Iustitiae. Jurisprudence of the Supreme Tribunal of the Apostolic Signatura*, Montréal, Wilson & Lafleur, Limitée, 2011, 441-528 (= DANIEL [ed.], *Ministerium Iustitiae*); SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Decrees of the College of Judges, 7 May 2010, in *Roman Replies and CLSA Advisory Opinions 2010*, Washington, D.C., CLSA, 2010, 11-32.

bishop (SC 42). Once established, this community of the faithful has the right to permanent existence; it is a public juridic person (c. 515, §3) which by its nature is perpetual (c. 120, §1). The diocesan bishop is the one who establishes a parish and he does this by decree. It is this decree that provides valuable historical information when there is any consideration of the merger of the parish.

A church, on the other hand, is defined in c. 1214 as a sacred building intended for divine worship, to which the faithful have the right of access for the exercise, especially the public exercise, of divine worship. The diocesan bishop gives express and written consent for a church to be built (c. 1215, §1), and he gives that consent only after consulting the council of priests and the rectors of neighbouring churches. Consultation with the presbyteral council and the rectors of the neighboring churches is a requirement for the validity of the act (cc. 124, 127). He then decides that the new church can serve the good of souls and that the necessary means will be available to build the church and to provide for divine worship (c. 1215, §2). Once the building is completed, it is dedicated or at least blessed (c. 1217, §1), and it becomes a sacred place. The solemn rites of dedication and blessing are those in the *Rite of Dedication of a Church and an Altar*. While the term “consecration” of a church is no longer used in the Latin Code or liturgical books, the Eastern Code continues to use the term “consecration” of a church rather than its “dedication” (CCEO, c. 869). The document that is prepared after the dedication and blessing is especially important to prove the facts of the liturgical ceremony that took place. It is this document that provides some of the information for any decree of merger.

Another lesson learned concerns the importance of the name of a parish and the title of a church.³ The name of the parish may be assigned from the name of a patron saint, while the title of the church is assigned to it within the liturgy of dedication or blessing (c. 1218). On 10 February 1999, the Congregation for Divine Worship and the Discipline of the Sacraments issued a notification concerning the title of churches.⁴ It reiterated that, once established in the dedication of a church, the title cannot be changed (c. 1218) unless, for grave reasons, it is expressly allowed by indult of the Apostolic See (no. 5). If a title has been assigned according to the Rite of Blessing of

³ See P. AMENTA, “The Title of Churches: Some Reflections on Canon 1218,” in *Monitor Ecclesiasticus*, 125 (2000), 111-119.

⁴ CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, Notification, *Omnis ecclesia titulum*, 10 February 1999, in *Notitiae*, 35 (1999), 158-159, translation in *Roman Replies and CLSA Advisory Opinions 1999*, Washington, CLSA, 1999, 20-21; and in *CLD*, vol. 14, 1099-1101.

a church, it may be changed by the diocesan bishop for a grave reason and with all factors duly considered (no. 6). The name of a parish may commonly be the same as the title of the parish church (no. 7). If several parishes are joined together so that a new parish is established, it is permitted, for pastoral reasons, to establish a new name different from the title of the parish church (no. 12).

In my experience with the creation of new parishes, the decree always ascribed a new name to the parish, which usually arose as a result of significant consultation and discussion with the parishioners of the new parish. In cases where we established a new name, parishioners participated in selecting the new name for their parish. A brochure was prepared to show that parish names give a sense of identity and belonging, calling parishioners to emulate the lives of saints (St. Anthony Daniel, St. Joseph, St. Anne), to deepen their devotion to the Blessed Mother (Immaculate Heart), or to move them to embrace more profoundly the mysteries of our faith (Sacred Heart). In the Diocese of Antigonish, we were involved in the change of name of two churches and thus sought the permission from the Congregation for Divine Worship and the Discipline of the Sacraments. In both situations, several churches closed and parishioners moved to one of the churches in the grouping. The new name of the church assisted the parishioners to be united as they gathered from several churches to the one church. The particular Decree from the Congregation stated: "It is hoped that this indult will play its part in the healing of difficulties for the faithful of the communities that have been united into this new parish."⁵

2 — *Lessons Learned in the Modification of Parishes*

As an existing public juridic person, a parish can be suppressed by a competent authority (c. 120, §1), amalgamated with other parishes to form a new one (c. 121), divided up and joined either to other parishes or the parts made into new parishes (c. 122). The authority competent to do this for parishes is the diocesan bishop (c. 515, §2). The Congregation for the Clergy issued a letter to local Ordinaries on 30 April 2013 outlining the procedural guidelines for the modification of parishes, the closure or relegation of churches to profane but not sordid use and the alienation of the same. The Congregation's letter explains that there are separate procedures for (a) the

⁵ CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, Decree, prot. no. 411/14, 25 July 2014 (unpublished).

modification of parishes, (b) the relegation to profane use and/or the permanent closure of churches, and (c) the alienation of current or former sacred edifices, and each must be followed carefully and correctly.⁶

For the modification of parishes, the letter emphasizes that a parish is a community of the faithful, a juridic person by law and perpetual by nature (cf. c. 120 §1; c. 515 §§1, 3). It cannot be extinguished or even notably altered without just cause. The document speaks of four possible types of parish modifications and calls for the use of the proper terms for the modification: i) extinctive union where A and B unite to form C, and only C remains; ii) extinctive union where A is subsumed into B and only B remains; iii) total division where A is divided into B and C, and only B and C remain; iv) suppression where A is extinguished and nothing remains. Since parishes are communities of the faithful, parishes as a general rule can only be united or divided and not suppressed. This terminology had already been included in a letter from the Congregation for the Clergy in 2006.⁷

The document notes that the authority competent to erect, suppress, or notably alter parishes is the diocesan bishop or those equivalent to him in law. He is competent to judge the existence of the required just cause, but his judgment must conform to ecclesiastical jurisprudence. According to this jurisprudence, the principal motivation for modifying a parish is a concern for souls (*Christus Dominus* 32), and this modification should be undertaken when the good of the faithful requires it. Jurisprudence indicates that an extinctive union or suppression should be the last choice when dealing with various problems affecting parochial life, insofar as other possible remedies should be considered beforehand and ruled out. Furthermore, jurisprudence acknowledges that the diocesan bishop can and sometimes should consider the good of the whole diocese in making his decision. Nonetheless, the reason(s) for modifying a particular parish must be relevant to that individual parish, i.e., the cause must be *ad rem*.

⁶ CONGREGATION FOR THE CLERGY, Letter, prot. no. 20131348, and Procedural Guidelines for the Modification of Parishes, the Closure or Relegation of Churches to Profane but Not Sordid Use, and the Alienation of the Same, 30 April 2013, in *The Jurist*, 73 (2013), 211-219 (= CONGREGATION FOR THE CLERGY, Procedural Guidelines). In summarizing this letter, I have used the work of Kurt MARTENS, "Brief Note Regarding the Reconfiguration of Parishes and the Relegation of Churches to Profane Use," in *The Jurist*, 73 (2013), 597-643.

⁷ CONGREGATION FOR THE CLERGY, Letter regarding the suppression and merger of parishes, 3 March 2006, prot. no. 20060481 (= CC, Letter regarding the suppression), in John A. RENKEN, *Particular Churches: Their Internal Ordering. Commentary on Canons 460-572*, Ottawa, Saint Paul University, 2011, 189-190 (=RENKEN, *Particular Churches*).

Before rendering his decision, the bishop must seek out the necessary information and, insofar as possible, hear those whose rights could be injured. Before consulting the members of the presbyteral council, which is required for validity, he must first provide them with all relevant information, lawfully convoke the council (cf. cc. 127 and 166), and then he himself must consult the members regarding each individual parish modification which has been proposed. The consultation must be genuine and should consider relevant arguments both for and against the proposed modifications.⁸ I was quite conscious of the importance of this consultation and brought as much information as possible for the council of priests to have a thorough discussion.

Any decree modifying a parish must be issued in writing at the time that the decision is given and then lawfully communicated without delay. The period of time during which hierarchical recourse may be presented begins with the lawful notification of the decree (cf. c. 1734, §2). In addition, the decree must mention at least in summary form the just cause(s) for the decision. It must clearly define the criteria for membership in all parishes affected and provide for the disposition of temporal goods in accord with law, respecting the intentions of donors.

What have I learned as I have been involved in the modification of parishes? Before any discussion of the modification of parishes, I knew I had to gather all the necessary information connected with the particular parish. I realized that this information would be both of a technical and juridical nature. On the one hand, technical information about the building must be collected, such as the site, measurements, state of the building, historical and artistic value, etc., while on the other hand, information of a juridical nature must be gathered, such as the property status, any agreements connected with the parish, any existing rights, etc. Information of a pastoral nature must also be collected: number and type of liturgical celebrations, number and origins of the faithful participating in those functions, future demographic developments in the area, devotional and other practices, etc. This gathering of information must also include the financial information connected with the parish in question. This information must be up to date and, if there is a question of comparing the report with other parishes, all financial information must be collected in a consistent manner from the parishes concerned.

⁸ Ian WATERS, "The Obligation of the Diocesan Bishop to Hear the Presbyteral Council before Altering a Parish," in *Roman Replies and CLSA Advisory Opinions 2002*, Washington, CLSA, 2002, 95-96.

Within the Diocese of Antigonish, several attempts were made over the past twenty years to consider the modification of parishes, especially due to the major economic and social changes that have occurred due to the closure of the coal mines and the steel plant. As well, a significant factor was the decline in the number of priests from about 250 in the 1950s and 1960s to forty active incardinated priests at present. Moreover, the decline in the number of parishioners was quite large, and this decline was due to out-migration as well as those who have become disaffected with the Church due to the sexual abuse of the clergy within the Diocese. Within the Diocese of Antigonish, local gatherings of all parishes took place to outline the larger context of the modification of parishes and the closure of churches. Parishioners were given this larger context and invited to make recommendations as to how the pastoral care of parishioners could take place. I learned the importance of these local information gatherings as a way to assist parishioners to become aware of the serious pastoral issues that were affecting the Diocese and the parishes of local areas. The Diocese had been involved in the clustering of parishes, but this process had reached its limit. Parishioners unanimously recognized that something must be done, that parishes had to be modified and even some churches needed to be closed, but they were adamant that their parish or church should not close.

Even though parish communities created committees to consider changes, parishioners were extremely hesitant to move in the direction of merger or closure. We even received the assistance of Brother Loughlan Sofield, S.T. in an attempt to assist parishioners to deal with the loss of a parish and/or a church. This was an extremely important learning, for I discovered in a new way the attachment that people have to their parish and especially to their parish church. Even long after the modification of a parish or the closure of a church, parishioners continue to experience deep sadness, anger and alienation, and this must be addressed if parishioners are to move forward in their life of faith.

Another learning connected with the modification of parishes is the possible loss in levy (or tax or assessment). Our experience has shown that there was a radical decline in the anticipated income from the parishioners whose parishes have been closed. As a result, we had to formulate a policy to calculate the levy for the new parish. For the Diocese of Antigonish, the annual diocesan levy is calculated as 13.5% of the three-year rolling average of ordinary revenues (e.g., Sunday collections) contributed annually in each parish. The closure of parishes has required the Diocese to consider an alternate process for determining the annual diocesan levy for parishes which are affected by parish closures. When a parish is closed and its parishioners are

merged into another parish in the geographic area, there will be an adjustment to the process of calculating the annual levy for the new parish. The levy calculation is applicable for the parish with which the closed parish(es) are merged. Merged parishes are gradually moving forward and finding some financial stability after following this policy for a few years.

Besides the issue of levy, I also learned the importance of the parish submitting a final financial report to the diocese with the closure of a parish and, if appropriate, to the government, e.g., charitable returns, at the appropriate time. Thus, Canada Revenue Agency requires that after any charitable status is revoked (or given up), all books and records that are on file at the time of closure must be kept for two years. The documents that must be kept on file have varying time lines, e.g., donation receipts must be kept for two years; minutes of any meetings and governing documents and bylaws for the organization from the time of registration; general ledger or other books of final entry, financial statements, source documents and copies of annual returns must be kept for six years. The parish or the new parish must be compliant with Revenue Canada obligations for maintaining documents for the required time line currently in place for financial information. As well, Canada Revenue Agency must be notified that the charitable status and the business number for payroll and the Harmonized Sales Tax are no longer required. All other official sacramental and church registers of the parish must be forwarded, upon closure, to the parish mentioned in the decree that will be welcoming the parishioners from the closed parish.

3 — Relegation to Profane Use and/or the Permanent Closure of Churches

The second procedure outlined in the 2013 letter from the Congregation for the Clergy involved the closure of churches and their relegation to profane use, especially according to canons 1214 and 1222. The letter highlights the disposition both in law and in tradition that a sacred building which has been given over perpetually for divine worship should retain that sacred character if at all possible, and only a grave reason to the contrary is sufficient to justify relegating a church to profane but not sordid use. Moreover, altars do not lose their dedication or blessing when the church does and can never be turned over to profane use for any reason (cc. 1212 and 1238). As well, according to jurisprudence, to close a church permanently is juridically equivalent to relegating it to profane use. Thus, the provisions of c. 1222, §2 must be used in the closure of churches.

The diocesan bishop or those equivalent to him in law is the authority competent to relegate a church to profane but not sordid use according to the norm of c. 1222, §2. He is also competent to judge the existence of the required grave cause, and his judgment must conform to ecclesiastical jurisprudence. To assess the gravity of a cause, each case must be considered individually, weighing the whole context of the situation. At times, the gravity of a cause will arise only from a combination of just causes, each insufficient in itself, but which together manifest the seriousness of the situation. When considering questions of finances, the relevant financial need is that of the juridic person, and it must be demonstrated that other reasonable sources of funding or assistance have been considered and found lacking or inadequate. The Congregation outlined a number of reasons that in themselves do not constitute a grave cause.

Before making his decision, the bishop must seek out the necessary proofs and, insofar as possible, hear those whose rights could be injured (cf. c. 50). In addition, before consulting the members of the presbyteral council, which is required for validity, he must first provide them with all relevant information, lawfully convoke the council, and then must consult the members regarding each individual relegation which has been proposed. The consultation must be genuine and should consider relevant arguments both for and against the proposed relegation. The bishop must also obtain the consent of those who claim legitimate rights in the edifice (cf. cc. 1222, §2 and 127) and verify that the good of souls will suffer no harm (cf. can 1222, §2). Finally, the bishop must give his decision by means of a decree issued in writing at the time when the decision is given and then lawfully communicated without delay. The period of time during which hierarchical recourse may be presented begins with the lawful notification of the decree, and the decree must mention at least in summary form the grave cause(s) for the decision.

As I entered into this process of relegating a church to profane but not sordid use, I quickly made some discoveries. Again the gathering of information connected with each church was extremely important, for this information contributes to the “grave reason” which the bishop must have for the closure of a particular church and its relegation to profane use. I shall return to this issue later.

A very important issue that is being stressed by the Congregation for the Clergy is the emphasis on appreciating a church as a sacred building as outlined in the liturgy and law of the Catholic Church. The Congregation states: “the starting point is the presumption that a church should retain its sacred character if at all possible.”⁹ This starting point is certainly affirmed

⁹ CONGREGATION FOR THE CLERGY, Letter to Bishop Brian Dunn, 2 September 2016, prot. no. 20162844, par. 3.

in the 1977 Rite for the Dedication of a Church and an Altar, which presents one of the most solemn liturgical services whereby a building is transformed into a sacred space called a church. This church is the place where the Christian community is gathered to hear the word of God, to offer intercession and praise to God, and above all to celebrate the holy mysteries. It is also the place where the holy sacrament of the Eucharist is reserved.

Because the church is a visible building, it stands as a special sign of the pilgrim Church on earth and reflects the Church dwelling in heaven. When a church is erected as a building destined solely and permanently for assembling the people of God and for carrying out sacred functions, it is fitting that it be dedicated to God with a solemn rite, in accordance with the ancient custom of the Church. The Rite of Dedication of a Church reminds us that “The very nature of a church demands that it be suited to sacred celebrations, dignified, evincing a noble beauty, not mere costly display, and it should stand as a sign and symbol of heavenly realities” (chapter 2, no. 3). Since churches are permanently set aside for the celebration of the divine mysteries, it is right for them to receive a dedication to God. While they can be secularized, the intention of a dedication or blessing is their permanency. Flowing from this theology, c. 1214 describes a church as a sacred building intended for divine worship, to which the faithful have right of access for the exercise, especially the public exercise of divine worship. This idea of a dedicated church being permanent must be the fundamental starting point in approaching the status of a church. I have noticed, along with others, that the Holy See seems to have a “greater willingness to consider the value of the building as a sacramental in its own right, [...] rather than simply as a location for pastoral ministrations.”¹⁰ The Congregation acknowledged in its decision the arguments that I used about the nature of a church: “The ordinary submits that the connection between the church and divine worship is so central, that if divine worship is not to be celebrated there, the argument for its closure is strengthened. [...] The jurisprudence of the Holy See, however, has established a very minimal threshold for public divine worship.”¹¹ From this theology and law, it is evident that, by definition, a church is necessarily connected with divine worship. When a church is no longer needed for worship, then it seems that an essential element connected with a church has been lost.

At the same time, the *Code of Canon Law* does mention that sacred places may lose their dedication or blessing if they have been in great measure

¹⁰ Gordon READ, “Church Closures in Cleveland,” in *Canon Law Society of Great Britain and Ireland Newsletter*, 170 (2012), 26 (=READ, “Church Closures”).

¹¹ CONGREGATION FOR THE CLERGY, Decision of 21 November 2016, prot. no. 20163702, no. 13.

destroyed, or if they have been permanently made over to secular usage, whether by decree of the competent ordinary or simply in fact (c. 1212). The Code provides that the diocesan bishop may relegate a particular church to be used for a profane but not sordid purpose provided that grave reasons indicate that it should no longer be used for divine worship (c. 1222).

The most important learning that I had was the realization that in any case of relegating a particular church to profane use, the issue of the “grave cause” is paramount. The 2013 document from the Congregation for the Clergy outlined the issues connected with a grave cause. These guidelines from the Congregation must be interpreted in connection with cc. 1212 and 1222. Canon 1212 describes how sacred places lose their dedication or blessing, namely, if they suffer major destruction or if they have been permanently given over to profane uses. Canon 1222 distinguishes the reasons for the closure of a church. Canon 1222, §1 deals with the situation of a church which cannot in any way be used for divine worship, and there is no possibility of its being restored. This means that there are serious problems with the building which permit the diocesan bishop to allow it to be used for some secular but not unbecoming purpose. The Diocese had one example of this kind. The use of a comprehensive report on the building’s structural and physical integrity, which showed that the building required extensive remedial intervention at an estimated cost of \$638,455, was an extremely important document to prove the state of the building.¹² In this situation, when a parishioner raised questions about some of the issues of the particular report, the case was rejected on recourse because of the comprehensive nature of the report. In situations that involve a report from a consultant firm, it is important that the information be reviewed and any questionable estimates be adjusted. In this situation, the Congregation affirmed that “the evaluation of grave reasons on this basis must be related to the concrete circumstances of time and place, the prudent consideration of the historical, architectural and artistic patrimony of the sacred edifice, the feasibility of fundraising, the prospects for ongoing maintenance as well as the retention of the building for ecclesiastical use for purposes other than sacred worship.”¹³

Connected with this situation, it was important to consider the feasibility of fundraising. While the recurrences argued that there could be sufficient funds gathered for the restoration of a particular church, I had to argue that attempts by a non-ecclesiastical group were not successful and thus the prospect of the success of the proposal of the recurrences was doubtful. The

¹² CONGREGATION FOR THE CLERGY, Decision of 3 January 2015, prot. no. 20144080, no. 15.

¹³ CONGREGATION FOR THE CLERGY, Decision of 3 January 2015, no. 12.

Congregation accepted my argument, for it stated that “The ordinary’s view does not appear to be based on an unreasonable rejection of practicable and feasible possibilities (cf. *Acta*, pp. 50-52).” It furthermore stated that “similar judgements based on a reasonable evaluation of the capacity of a community to raise the necessary funds have been upheld before the Holy See (cf. *Decree of the Supreme Tribunal of the Apostolic Signatura*, N. 41700/08, issued on 18 June 2009, 10).”¹⁴

Besides the physical state of a church, c. 1222, §2 also deals with another situation, where other grave reasons suggest that a particular church should no longer be used for divine worship and the diocesan bishop may allow it to be used for a secular but not unbecoming purpose. This was the usual situation in my experience. Canon 1222, §2 requires the bishop to consult the council of priests, to have the consent of those who could lawfully claim rights over that church, and be sure that the good of souls would not be harmed by the transfer.

Regarding this “grave cause”, I found the history behind c. 1222, as well as the discussion of this canon during the revision of the 1917 Code, very instructive. This history was included in a decision from the Apostolic Signatura that states:

... broader faculties were to be granted to local ordinaries so that the very frequent recourses to the Apostolic See might be avoided—in 1977, new laws on this subject were proposed as well; these confirmed the faculty given to bishops to reduce a church to profane use, but they immediately established the greater advancement of the good of souls as the prevalent and sufficient cause for using it. [...] thus was born the text of the current c. 1222, which, while granting a faculty that is broader than it was in the old law, nevertheless somewhat restricts its use since its legitimate use requires grave causes.

For this reason, the second paragraph of c. 1222 contains a certain indetermination; for on the one hand it safeguards the bishop’s faculty, while on the other hand it attempts to moderate its use. For it says, “Where other grave causes suggest ...,” but it does not give an example of the kind of causes or insinuate that cases can sometimes become grave because of particular circumstances.

6. This difficulty is resolved by justly examining the letter of the law, for it confirms the faculty of local ordinaries to reduce churches to profane, non-sordid use; hence the legitimate use of the faculty depends on the gravity of the causes for which the reduction is accomplished. The causes required by the law are grave, not most grave: excluded therefore are trifling

¹⁴ Ibid., no. 19.

matters or causes that by their very nature cannot be considered. On the other hand, even if a cause is apparently insignificant, its gravity can be evaluated in various ways if one diligently considers circumstances, places, and financial or personal matters; these become known especially to the ordinary: indeed, it is a question of fact.¹⁵

The concept of “grave reason” occurs in forty-four instances in the 1983 *Code of Canon Law*, establishing the requirement of a grave reason for the validity or liceity of an act, according to various circumstances. In reviewing these examples, one can readily see that the concept of gravity is not something absolute; it cannot be measured with mathematical precision. The gravity of the reason results from the sum of circumstances which show that the reason is of great importance in the concrete case. The recent document from the Congregation for the Clergy of April 2013 deals with this need for a grave reason. “To access the gravity of a cause, each case must be considered individually, weighing the whole context of the situation. At times the gravity of a cause will arise only from a combination of just causes, each insufficient in itself, but which together manifest the seriousness of the situation.”¹⁶ In fact the jurisprudence connected with the decisions in my situations consistently used the same statement, namely: “Such causes may arise from a diligent examination of various factors, including the circumstance of the place, economic considerations, and the challenges facing the particular community (cf. *Definitive Sentence of the Supreme Tribunal of the Apostolic Signatura*, N. 24388/93, 4 May 1996; *Decree of the Supreme Tribunal of the Apostolic Signatura*, N. 41700/08, 18 June 2009, 8).”¹⁷

In one of my decrees, I used the following as motivating causes: the declining and aging populations in the merged parishes, a decline in the number of priests, a decline in Mass attendance, the increasing costs of maintaining buildings, a decline in the number of people available for parish ministries, the need for greater collaboration among the joined parish communities, and the indebtedness of the parish.¹⁸ The Congregation acknowledged that these indeed amounted to the grave reason necessary to relegate a church to profane use.

¹⁵ COLLEGE OF THE SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, *Definitive Sentence*, 4 May 1996, prot. no. 24388/93 CA, in DANIEL (ed.), *Ministerium Iustitiae*, nn. 278-279, 523-524.

¹⁶ CONGREGATION FOR THE CLERGY, *Procedural Guidelines*, 2f.

¹⁷ CONGREGATION FOR THE CLERGY, *Decision of 3 January 2015*, no. 11; ID., *Decision of 6 February 2015*, prot. no. 20150111, no. 17; ID., *Decision of 21 November 2016*, no. 8.

¹⁸ Bishop Brian DUNN, *Decree of Closure and Secularization of Saint Barra Church, Christmas Island*, 25 October 2015. See also CONGREGATION FOR THE CLERGY, *Decision of 21 November 2016*, no. 12.

The document from the Congregation for the Clergy mentioned several reasons which jurisprudence has established that in themselves do not constitute grave cause: i) a general plan of the diocese to reduce the number of churches; ii) the church is no longer needed; iii) the parish has been suppressed; iv) the number of parishioners has decreased; v) closure will not harm the good of souls; vi) a desire to promote the unity of the parish; vii) some potential future cause that has not actually happened yet.

In one of my cases, this became important, for the Congregation stated: “while it is true that a combination of just causes may together manifest the seriousness of the situation (cf. paragraph 2f), there is no suggestion that these reasons listed (cf. paragraph 2h) are considered to be just causes which together could constitute a grave one. The list is included, in fact, to highlight that these reasons are particularly problematic.”¹⁹ In his article on the relegation of churches to profane use, Fr. Schöch from the Apostolic Signatura mentions some others reasons that are insufficient: i) the fact that the presbyteral council or the pastor or the pastoral council is in favor of the decision; ii) the lack of ordained clergy and the consequent reduction of the liturgical use of the church to a few times a year; iii) the need to concentrate pastoral activity and the Sunday celebration of the liturgy in the one parish church.²⁰

Another learning that I experienced involved the salvation of souls. In his decision, the bishop has to ensure that the good of souls does not suffer any detriment in the relegation of a church to profane use. Jurisprudence has noted that some issues do not cause harm to souls, namely, not being overly burdened in fulfilling their religious duties or having to travel a few miles. A small inconvenience is not detrimental to the good of souls. One case in 1996 was affirmed by both the Congregation for the Clergy and the Apostolic Signatura when the bishop’s reasons for secularizing a church included: 1) the upkeep of three churches would be an excessive burden for a parish starting out with many debts; 2) the number of the faithful was decreasing and the care of souls did not require so many churches open for worship; 3) the sale of the church meant an important financial contribution to the new parish.²¹

Canon 1222, §2 states that it is necessary to consult the council of priests. This was done, in general, through the sharing of the pastoral plans for each

¹⁹ CONGREGATION FOR THE CLERGY, Letter to Bishop Brian Dunn, 2 September 2016, prot. no. 20162844, par. 3.

²⁰ SCHÖCH, “Relegation of Churches,” 494.

²¹ SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, *coram* Agustoni, 6 May 1996, in *Forum*, 7 (1996), 359-371.

of the seven deaneries when there was discussion of the various churches which might be slated for closure. Then, when the time came for an individual church to be relegated to profane use, the council discussed the various reasons in connection with the decision of that church and voted accordingly. I was particularly conscious that it is absolutely essential that a separate discussion and vote take place for each merger of parishes and each relegation of a church to profane use.²² I was aware that the Holy See had overturned the decrees of closure of thirteen churches in the Diocese of Cleveland due to a neglect of following of the appropriate procedures.²³

Another learning involved the importance of the liturgical celebration to acknowledge the closure of each church. When the time came for the closure of a particular church, we had a final Eucharistic celebration in the Church, at the end of which included the Secularization of the Church. This ceremony was based on the Rite of Dedication of a Church and Altar and included praying at a variety of stations within the church.²⁴ At this ceremony, the Decree of Secularization was read to all, including a reference that parishioners had the opportunity to have recourse against the decree.

Once the church has been relegated to profane but not sordid use, the diocese with the parish must ensure that several actions are completed with regard to the closed church. Arrangements must be made with the pastor and parish pastoral council and the parish finance council for several issues. The first issue concerns the ownership of the building. In the situation where most of our dioceses are organized civilly as a corporation sole, the building continues to belong to the civil corporation of the diocese. However, canonically the building belongs to the parish, and it is the role of the parish administrator, i.e., the pastor, to ensure that the ownership of the building is clarified. In situations where each parish has its own civil corporation, then the pastor must deal with the civil and canonical ownership of the building.

²² Thomas J. PAPROCKI, "Parish Closings and Administrative Recourse to the Apostolic See: Recent Experiences of the Archdiocese of Chicago," in *The Jurist*, 55 (1995), 894; James PROVOST, "Some Canonical Considerations on Closing Parishes," in *The Jurist*, 43 (1993), 365, 367 (=PROVOST, "Some Canonical Considerations").

²³ CONGREGATION FOR THE CLERGY, Decree, 1 March 2012, no. 21: "An essential element for the validity of the relegation of a church to secular but not unbecoming use was omitted, i.e., the required consultation of the Presbyteral Council regarding the matter." Cf. Michael O'MALLEY, "Vatican Reverses Cleveland Catholic Diocese's Closing of 13 Parishes," in *The Plain Dealer*, 7 March 2012; Gordon READ, "Church Closures," 23-28.

²⁴ For a consideration of several Rites of Parish Closure, see Michael WELDON, *A Struggle for Holy Ground. Reconciliation and the Rites of Parish Closure*, Collegeville, The Liturgical Press, 2004; David G. CARON, "A Ritual Response to Church Closures: A Pastoral Challenge," *Liturgical Ministry*, 14 (Winter 2005), 27-35.

After discussing this with the parish finance council and the parish pastoral council, and if the parish has no desire for the building especially in an atmosphere of limited resources, the pastor may see that the building is transferred canonically to the diocese.

Then the future use of the building must be decided. If the building is being transferred to the diocese, an appropriate agreement must be prepared to ensure that no undue burden is carried by the parish. The agreement will consider some of the following issues, e.g., payment of insurance, taxes, utilities, etc. Once a building is sold, any liabilities connected with the building will usually be paid from any remaining proceeds of the sale of the building, e.g., water bills, electric bills, insurance arrears, etc.

Since the Church is being secularized, sacred objects, and vessels used for sacred purposes should be made available for other Catholic or Christian churches or religious communities seeking such items. Blessed objects shall not be sold for personal profit. Sometimes objects, vessels, furniture and vestments may be kept in storage. In closing a church, or when making other significant changes in the status of the church, the bishop is required to consult those affected. This is particularly important if a significant donation was made of a statue or other religious article with a certain condition connected to the item. The diocesan bishop will thus have to respect the intention of the founders or their heirs, the patrons of churches, and all those who made the construction, restoration and long term preservation of the church possible with their donations. At the same time, a distinction is to be made between one or more large donations which made construction, restoration and preservation possible, and small offerings made during Sunday Mass for the construction or renovation of the church.²⁵

The diocesan bishop must also consider the wishes of the founder and benefactors, as well as acquired rights. The wishes of founders refer to intentions of the founders at the time the parish was erected. Acquired rights could be, for example, those belonging to a religious community that, by agreement, has provided pastoral care for a parish for many decades. As well, the view of the pastor is absolutely important in the argument for closure. A decision from the Congregation for the Clergy states: "The only person revealed in the acts who could lawfully claim rights over the church, within the meaning of c. 1222 §2, is the pastor, whose consent is given."²⁶

²⁵ SCHÖCH, "Relegation of Churches," 498.

²⁶ CONGREGATION FOR THE CLERGY, Decision of 21 November 2016, no. 11. See also *id.*, Decision of 3 January 2015, nn. 17, 22; *id.*, Decision of 6 February 2015, no. 26.

Insurance in the Diocese of Antigonish is connected with the Roman Catholic Episcopal Corporation. When buildings are closed, the building's insurance must be adjusted so that the building has appropriate insurance. The insurance premium may require that a caretaker or a volunteer regularly check the building, e.g., a few times a week.

Once a building is closed and before it is sold, it must be secured. This may also require an alarm system. Sometimes the building may have to be boarded up. The parish must devise a plan to physically check the property periodically. In one situation, a church was vandalized several times, and a fire was lit in the building. As a result, the town demanded that the former church be demolished within a few weeks. This caused some hardship, for example, in getting an appropriate quotation for the work, especially with concerns of asbestos as well as lead paint from the interior. Another issue connected to security involves those who have keys to the church. The Diocese had a situation when a church was for sale, and a buyer was ready to close the deal. Before the deal could be closed, someone entered the church and removed all the cupboards from the church basement. As a result, the deal was substantially decreased because of the loss of the cupboards. The changing of keys is an important element in securing the building!

A decision must be made regarding whether or not the power should be kept on in the building, whether or not the water should be turned off, whether heat should be kept on in the building. All of these decisions have implications for further costs associated with a closed building. Other decisions must be made regarding the draining of pipes, draining of oil tanks, discontinuing the phone service, etc. Decisions must be made regarding the mowing of the lawn, exterior maintenance, snow removal, etc.

When a Church is secularized, it is no longer tax exempt and large tax bills may be received. In our Diocese, we had several situations where the taxes were increased to an exorbitant amount. One way of dealing with this issue is to close the building without relegating it to profane use. Thus, it would still be considered a church from the perspective of the municipality.

After twenty-four months or so, if a surplus building cannot be sold or used for another purpose, discussion should take place regarding the demolition of the building in order to reduce any potential liability to the diocese and the parish. Some consideration might be given to the transfer of the building to another corporation, in order to protect the diocese from liability. Once the building is demolished, and if the land is then sold, any proceeds will first pay for the cost of demolition, and then any surplus will be allocated in the manner agreed to by both the parish and the diocese. As we can

see, there are a number of important canonical and practical issues that arise with the relegation of a church to profane use.

4 — Procedure for the Alienation of Churches

The third procedure outlined in the 2013 letter from the Congregation for the Clergy involves the alienation of churches, especially as found in cc. 1291-1298. These canons on alienation apply not only to the actual sale of an edifice but also to other transactions which could harm the stable patrimony of the juridic person which owns it. If, after it is alienated, a church will remain in use as a Catholic place for divine worship by a different Church *sui iuris*, it should not be relegated to profane use prior to the alienation. However, in all other situations, it must be relegated to profane but not sordid use prior to being alienated. The Congregation makes suggestions as to the preferred use of the building, including for use as a place for the exercise of other Catholic apostolates or ministries, for profane but not sordid use in keeping with the dignity of the edifice as a former church or demolition of the edifice in order to recover the land (3 d). The Guidelines strongly state that under no circumstances can the edifice be alienated for use inconsistent with its inherent dignity as a former church. Contractual agreements are to be put in place to safeguard this point in civil law as well as in canon law. The Guidelines state that the competent authority must assure that there is no reasonable possibility of scandal or loss of the faithful which will result from the proposed alienation. This guideline is extremely difficult to follow as many parishioners often fail to continue to attend church after the church's closure.

The Guidelines emphasize that, prior to alienation, all sacred objects, relics, sacred furnishings, stained glass windows, bells, confessionals, altars, etc. are to be removed for use in other sacred edifices or to be stored in ecclesiastical custody. Because altars can never be turned over to profane use, if they cannot be removed, they must be destroyed (cf. cc. 1212 and 1238). In the Diocese of Antigonish, we established two storage places for these sacred objects. Regarding the procedures for alienation, the annual decree from the Conference of Bishops provides some guidance as to how a bishop must seek the advice or consent of the diocesan finance council, the college of consultors, interested parties and even the consent of the Holy See (cf. c. 1292, §2).

It is important to recognize that, when a parish closes, the assets and the liabilities of the closed parish are transferred to the new parish, not to the

diocese. A few years ago, the Congregation for the Clergy reminded bishops in the United States of America that, when a parish is merged with other parishes, the corresponding patrimony and obligations of the closed parishes must follow the faithful in an equitable and proportionate fashion.²⁷ The newly enlarged parish must receive the goods and liabilities. It is an erroneous use of c. 123 to say that the goods and liabilities of closed parishes pass to the diocese as the higher juridic person. In other words, the closure of parishes or churches must not be a way for the diocese to increase its assets. However, the parish may not be able to deal with a closed building and may freely decide to pass the building over to the diocese. The Congregation for the Clergy clarified for the Diocese of Antigonish that “Parishes could not be ‘forced’ to allow their patrimony to be used by the Diocese for its purposes, but nothing would preclude the voluntary participation of such a ‘Public Juridic Person’ in a programme of the Diocese providing the laws of the Church are respected.”²⁸ In the Diocese of Antigonish, churches have been sold to other denominations,²⁹ to other groups, as well as to individuals for use as apartments or businesses.

5 — *Hierarchical Recourse*

In cases of parish reconfiguration and relegation of churches to profane use, the author of the decree is the diocesan bishop. A person who feels aggrieved by a singular administrative decree of the bishop can make recourse to the hierarchical superior of the one who issued the decree (cf. c. 1737, §1). The process begins by the person asking the bishop to revoke or reconsider his decree. If this is denied, the person can then make recourse to the Congregation for the Clergy. The Congregation can review all aspects of the decree, not only examining potential violations of the law but also looking into the merits of the case. Once the Congregation has made a decision in the case, recourse against the decree of the Congregation can be made to the Supreme Tribunal of the Apostolic Signatura. The scope of the review

²⁷ CONGREGATION FOR THE CLERGY, Letter regarding the suppression, in RENKEN, *Particular Churches*, 189-190.

²⁸ CONGREGATION FOR THE CLERGY, Letter to Bishop Brian Dunn, 30 September 2010, prot. no. 20092549.

²⁹ William Woestman argues that selling a Church to a non-Catholic community is not considered to be handing it over for an unbecoming purpose. See WOESTMAN, “Relegating a Church to Profane Use,” in *Roman Replies and CLSA Advisory Opinions 2002*, Washington, D.C., CLSA, 2002, 130-131.

by the Apostolic Signatura is limited to violations of the law either in the substance of the decision or in the procedure used.³⁰

In the situations of recourse in the Diocese of Antigonish, one involved recourse against the creation of a new parish, three involved the decree of relegating a church to profane but not sordid use, one involved a plaint of nullity against an original deanery plan for the modification of parishes and the closure of churches and one parish even raised a plaint of nullity against a decree of the Congregation for the Clergy. Only one case has been sent to the Apostolic Signatura. Aside from the last two cases which have not been decided, the Holy See has sided with the Diocese in each case.

In the cases from this Diocese, those making recourse often focused on the financial statements associated with parishes or churches. Thus, I learned that it is absolutely essential that the financial statements involved should reflect meticulously the financial status of the parish or church. In this regard, diocesan financial officers need to review annually the financial statements that are submitted from parishes, noting any inconsistencies or irregular information.

In one situation of the proposed closure of a church, parishioners decided to go to the civil court to get an injunction against the closure and threatened to pursue an application to declare an equitable interest in the property of the Church.³¹ This situation involved the need for civil lawyers and the possible exorbitant cost that occurs when issues go to the civil courts. While the civil courts generally follow the law of the Church, a diocese needs to be aware of the danger of creating a precedent for other dioceses. In this situation, I withdrew my decision because it was clear that the Diocese was not ready to take on the financial cost of a civil court case nor did it want a possible precedent created by the civil court.

Another learning involved an expression from the 1987 authentic interpretation, which considered the standing of individuals to act in a recourse, noting that the individuals must “have truly suffered a grievance.” The Apostolic Signatura clarified this condition. It stated that the persons involved must claim to be aggrieved. “A *grievance* in a case presupposes that the recurrent has some subjective right or at least an interest; in order for this interest to provide a basis for an action it cannot be just any interest

³⁰ For a review of the procedures involved in recourse, see John P. BEAL, “Hierarchical Recourse: Procedures at the Local Level,” in *CLSA Proceedings*, 62 (2000), 93-106; Joseph R. PUNDERSON, “Hierarchical Recourse to the Holy See: Theory and Practice,” in *CLSA Proceedings*, 62 (2000), 19-47 (=PUNDERSON, “Hierarchical Recourse”).

³¹ Letter of Rosanne SKOKE to Bruce MacIntosh, 27 October 2017.

whatsoever but, as doctrine teaches, it must be *personal, direct, actual, and at least indirectly protected by the law*. In addition, there must be a relationship of proportionality between the harmed interest and the motives which moved the superior to place the administrative act.”³² In its decision of 6 February 2015, the Congregation provided an important clarification. It argued that “the reduction to secular but not unbecoming use of a church that has served as the ordinary locus of worship for the faithful of a given community, particularly the seat of a former parish, affects the practice of the faith individually and collectively [... and] certainly constitutes a real interest that is ‘personal, direct, actual, and at least indirectly protected by the law’. In short, it constitutes a true grievance and thus confers active legitimation, namely the right to bring hierarchic recourse.”³³

At the same time, the closure of a church does not necessarily bring grave detriment upon parishioners. All the obligations and rights of the lay Christian faithful do not depend on the preservation of a certain church, if they have the possibility of fulfilling those duties in a church which is proximate to all parishioners. Ultimately, the Apostolic Signatura clearly states: “The spiritual good of the faithful is not to be evaluated only in light of the wishes and desires of certain members of the parish; the bishop, the shepherd to whom the care of all the faithful in the diocese has been entrusted, must provide for the spiritual good of all, for example by means of an equal distribution of priests in the diocese.”³⁴

Another learning involved the fact that one parishioner made recourse even before a decree was issued. The public announcement of the pastoral plan for a deanery was enough for a person to begin hierarchical recourse in advance of the written decree. This public announcement was sufficient for the Holy See to accept recourse, “for the term *decree* refers primarily to the decision itself, not to the form in which it is expressed or communicated.”³⁵

Sometimes the recourses allege that there are “real” reasons for certain actions taken, e.g., that the bishop appointed a certain priest with a mission to close a church or that a church was closed because the diocese needed to sell the property to raise funds. I am grateful that the Roman dicasteries,

³² CONGRESSO OF THE SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Decree *coram* Sabattani, 21 November 1987, prot. no. 17447/85 CA, in DANIEL (ed.), *Ministerium Iustitiae*, nn. 232, 452 (=SIGNATURA, Decree *coram* Sabattani).

³³ CONGREGATION FOR THE CLERGY, Decision of 6 February 2015, no. 13.

³⁴ Definitive Decree of the College of the Supreme Tribunal of the Apostolic Signatura, 25 June 1994, prot. no. 24048/93 CA, in DANIEL (ed.), *Ministerium Iustitiae*, 477-478.

³⁵ PUNDERSON, “Hierarchical Recourse,” 27.

while acknowledging the merit of some objections offered by the recur-rents,³⁶ did not focus on these allegations but on the reasons that were pre-sented in the official decree.

Concerning time lines, the Roman Curia certainly gives the benefit of the doubt to those who seek recourse. While this approach can give parishioners a greater possibility of vindicating their legitimate rights, this can also be stretched to the limit. For example, in one case of recourse, the decree was issued in October and reconsideration was requested four months later in February. I responded within a month, and the recourse was then sought to the Congregation for the Clergy. The Congregation was willing to sanate the procedural defects of the non-observance of canonical time limits in the interests of justice and the confusion over the status of the petition. As well, the Congregation readily extended time lines according to article 136 §2 of the *General Regulations of the Roman Curia* as it waited for a response from the Diocese.³⁷ On the other hand, when a petitioner made recourse seeking a plaint of nullity against the original pastoral plan for a region, the Congregation stated emphatically that the “petition has been presented well over four years outside the canonical time limits” and declared that the petition was inadmissible in law and was not accepted for study.³⁸

Conclusions

After reflecting on the issues involved in the merger of parishes and the closure of churches, I would like to propose the following recommendations.

1. I would suggest that all involved in these issues have a clear understanding of the difference between a parish and a church, a distinction which will assist greatly in recognizing the appropriate procedures that are required when parishes need to be merged and churches need to be closed.
2. The gathering of information is an essential element in the processes involved. This gathering of information must be done in a consistent way, ensuring that accurate pastoral and financial information is collected for each individual situation. It also provides an opportunity for

³⁶ CONGREGATION FOR THE CLERGY, Decision of 21 November 2016, no. 11.

³⁷ CONGREGATION FOR THE CLERGY, Letter to Bishop Brian Dunn, 23 July 2016, prot. no. 20161239.

³⁸ CONGREGATION FOR THE CLERGY, Letter to Barry J. George et al., 13 July 2017, Prot. no. 20172582.

- parishioners to receive information about their parish situation as well as an opportunity to give input into any decisions that will be made.
3. When parishioners make recourse against the decision of the bishop, we need to have a profound respect for their right to make this recourse. Their action must be taken seriously. At the same time, a parish is not a self-serving community but must be engaged in the broader communion of the Church. As James Provost says, “the Catholic Church is not a convention of community churches, but a communion of local eucharistic communities bonded together in hierarchical communion [...]. It would be contrary to the nature of the Church for someone to lay claim to a specified parochial community to the detriment of the communion of the diocese or the pastoral welfare of the rest of the parishes.”³⁹ At the same time, we might recognize, especially in connection with efforts at seeking heritage status for churches, we may be witnessing what seems to be a general thrust in our society to preserve anything from the past.
 4. In spite of the experience of the closure of churches, we need to have a profound respect for the sacredness of a church after it is dedicated or blessed. In the long run, all need to nurture a certain understanding of a church. On the one hand, we need to appreciate deeply the dignity of churches as sacred places and not consider them simply as financial burdens, objects of commerce, or financial assets available for paying off the debts of a parish or diocese or religious institute.⁴⁰ At the same time, the church building above all is a memorial and witness to the Christian faith professed and celebrated by the faithful in a certain place. It is not to be treasured only in light of any historic or artistic value but because of the public divine worship to which it gives a visible testimony in a secularized society. The Apostolic Signatura has made it clear that an interest in preserving sacred buildings or monuments of the Church outstanding for their art or history does not provide a foundation for presenting hierarchical recourse.⁴¹
 5. Often a pastoral approach and a canonical approach are seen as opposites, but that is a wrong impression. A canonical approach is in essence

³⁹ PROVOST, “Some Canonical Considerations,” 367.

⁴⁰ SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Definitive Decree, 30 November 2002, prot. no. 31208/00 C.A. (unpublished), mentioned in SCHÖCH, “Relegation of Churches,” 502.

⁴¹ SIGNATURA, Decree *coram* Sabattani, no. 7c, in DANIEL (ed.), *Ministerium Iustitiae*, no. 237, 458; see also, CONGRESSO OF THE SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Decree *coram* Silvestrini, 26 January 1990, prot. no. 21024/89 CA, in *ibid.*, 465.

a very pastoral approach, because the canonical or legal approach, which follows appropriate canonical procedures, creates the conditions necessary for the changing of hearts.

6. The situation involving the mergers of parishes and the closure of churches creates an atmosphere of deep hurt, disappointment, sadness and anger and must be approached with much compassion. We need to appreciate the sense of loss and grief, the sense of disappointment and anger, and the sense of sadness of parishioners who lose their parish or church. I believe that these emotions arise when people recognize how their spiritual lives have been nourished in a particular parish with a particular church. We need to acknowledge the consequences of some of these decisions:

- the increasing inability of the Church to attract, motivate, retain and govern a talented and committed work force;
- the serious problems in raising money for capital and operating expenses and inefficient management of financial and physical resources;
- the loss of reputation and standing among all its constituencies (clergy, laity), which is dramatically undermining its ability to carry out its mission and care for its flock;
- an increasing indifference, laxity and even rejection of Church doctrine by practicing Catholics and large increases in the numbers of non-practicing Catholics;
- the increasing impatience on the part of the faithful with the arrogant, defensive and secretive stance of Church leaders.

We have witnessed in our dioceses a sharp decline in church attendance and commitment by people to their parishes. Revenues have dropped and, for many places, once thriving ministries and faith formation programs are but shadows of their former days. We no longer can continue to pray, worship, minister, and operate in such a radically altered climate without asking ourselves in what new ways must we engage our people in the life of the Church. Our world is now becoming increasingly more global, and the geographic boundaries of our daily life have expanded (for school, doctors, shopping, entertainment, sports, etc). We also need to consider our traditional parish boundaries to see how they might be aligned to serve better our needs as disciples. Our young people have broader horizons, and while this may be challenging and dislocating, we need to look beyond our present circumstances and openly ask where God may be calling us today.

As we reflect on these topics, our parish situations must lead us to ask the serious questions of how we continue to invite people into the faith, support them on their journey and continue to reach out to others. As a diocese, we must keep first and foremost the task of making disciples. We need to have parish structures that will contribute to the spiritual growth of parishioners as they respond to the challenge to make disciples. These structures must ensure the quality of faith formation programs; ministries that are active for outreach to the poor, marginalized, young families, youth; liturgies that are vibrant with the appropriate numbers of lay ministers; an atmosphere that nurtures hospitality with a real concern for everyone; a just way of stewardship so that finances are used for education, formation and outreach ministry rather than simply keeping a building open. Thus, the structures of our parishes must focus on these tasks of making disciples, rather than merely preserving a physical building so that we offer Mass once a week. As we can appreciate by this reflection, the merger of parishes and the closures triggers an examination of the very nature of being disciples in our world today.

THE RIGHT OF THE FAITHFUL TO ENTER A CHURCH FOR THE OFFERING OF DIVINE WORSHIP

EDWARD M. LOHSE*

SUMMARY — The right of the faithful to enter a church for the offering of divine worship has been in place since the end of the fifth century but was first explicitly articulated in the *Code of Canon Law* only in 1983. That articulation in canon 1214 contains a significant innovation. Through the insertion of the word *praesertim* (especially) in the text of the canon, the scope of the objective right of entry—and of its corresponding subjective right to enter—now extends *especially* to the offering of public divine worship, and logically therefore it now also extends toward the offering of private devotional prayer. The historical development of this right of entry (*ius adeundi*) and its current formulation in canon 1214 illustrate the significance of this innovation and its ramifications for competent authority who attempt to regulate or restrict the exercise of the subjective right of the faithful to enter a church.

RÉSUMÉ — Le droit des fidèles d’entrer dans une église pour la célébration du culte divin existe depuis la fin du cinquième siècle mais a été explicitement articulé pour la première fois dans le *Code de droit canonique* de 1983. Cette articulation au canon 1214 contient une innovation importante. Par l’ajout du mot *praesertim* (spécialement) au texte du canon, le droit objectif d’entrée—et le droit subjectif correspondant d’entrer—s’étend *spécialement* à l’offre du culte divin public et, logiquement donc, il s’étend aussi maintenant à l’offre de la prière dévotionnelle privée. Le développement historique de ce droit d’entrée (*ius adeundi*) et sa formulation actuelle au canon 1214 illustre la signification de cette innovation et ses ramifications pour l’autorité compétente qui tente de régler ou restreindre l’exercice de ce droit subjectif des fidèles d’entrer dans une église.

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Introduction

Until fairly recently, any discussion of the right of entry into sacred edifices for the offering of divine worship had to consider the right of entry into churches as separate from the right of entry into public oratories. Furthermore, one had to consider whether the worship to be offered was public divine worship or private. With the promulgation of the revised *Code of Canon Law* in 1983, these considerations ceased to have any relevance, on the one hand because all public oratories were canonically transformed into churches, and on the other hand because the right now extends to private as well as to public divine worship.

Understanding how these changes came about is key to understanding the right of entry into churches for the offering of divine worship as it exists today and as it is expressed in canon 1214 of the revised *Code of Canon Law*. In the revision of the Code, the objective right—i.e., that which is owed—was significantly altered. The faithful now have the right to enter a church not only to join in the celebration of the Mass, but also for private worship, such as making a visit to the Blessed Sacrament. This understanding of an expanded right of entry is yet to be realized in many places where an understanding of the right as it existed in the 1917 Code is still operative. As a correct understanding of the revised and expanded right comes to light, it will require a change of thinking—and more often than not a change of practice—on the part of numerous individuals.

1 — The Development of the Right of Entry Prior to CIC 1917

The right of entry into churches developed separately from the right of entry into public oratories, until eventually those two categories of sacred edifices were intentionally merged in the revision of the 1917 Code. For this reason, it is helpful to consider the development of the right relative to churches apart from that relative to public oratories, until the period in which the two categories of edifices were merged.

1.1 — The Right of Entry into Churches

The earliest references to a right of the faithful to enter a church are found in two letters from Pope Gelasius I. In both letters, he was responding to the question of whether or not the benefactor of a church could restrict entrance during times of divine services. In the first of these, Gelasius stated that

because the donor had given the church for the benefit of the Church's ministers, the donor could claim, "without doubt, no proper rights for himself except the entrance of the procession, which is owed to every Christian."¹ In the second letter, Gelasius' reply concerning the founder of a basilica was similar: the founder himself was owed nothing, and had "nothing needing to be vindicated, except the entrance of the procession, which is owed in common to all Christians."² In these two responses, we find the earliest recorded references to a right of all Christians to enter a church, expressed at that time as the right of the procession to enter "owed in common to all Christians."³ In the sixth century, the Emperor Justinian reinforced this sense by issuing imperial decisions of his own.⁴ These references point to the fact that since the time of Pope Gelasius this right has never been seriously called into question, and from the reign of Justinian until the promulgation of the 1983 Code, it was often implied but not actually articulated in the law.

1.2 — The Right of Entry into Oratories

In comparison with the right of entry into churches, the right of entry into oratories was a very different matter. The question of who could worship in oratories was often a highly contested point. Prior to the Council of Trent, most legislation on this matter was on a diocesan or provincial level, and more than often than not that legislation focused on restricting access to oratories rather than extending it. The Council of Trent enacted universal legislation concerning oratories, continuing the restrictive trend. In the twenty-second session of the council, the Council Fathers turned their attention to the worthy celebration of the Mass, including the dignity of the places in which Mass could be offered. In the decree *Quanta cura*, they said that bishops are not "to permit that this holy sacrifice [of the Eucharist] be carried out in private homes, by any secular or religious whosoever, nor altogether outside of a church, and [altogether outside of] oratories dedicated solely to divine worship, and which need to have been so designated and visited [beforehand] by those same ordinaries."⁵

¹ C. 16, q. 7, c. 26. All translations from Latin texts are the author's own unless otherwise indicated.

² C. 16, q. 7, c. 27.

³ Ibid.

⁴ Cf. Nov. 67,1; 67, 2; and 131,7.

⁵ COUNCIL OF TRENT, session 22, decree *Quanta cura*, 17 September 1562, in CENTRO DI DOCUMENTAZIONE ISTITUTO PER LE SCIENZE RELIGIOSE, BOLOGNA (ed.), *Conciliarum Oecumenicorum Decreta*, Freiburg im Breisgau, Herder Verlag, 1962, 713.

By means of this provision in *Quanta cura*, the Council Fathers greatly restricted the authority of bishops to authorize places for the celebration of the Eucharist. Bishops could allow Mass to be celebrated only in churches and in those oratories which were dedicated solely to divine worship, which were so designated by the bishop, and which that same bishop had visited and found suitable for the celebration of the liturgy. They could not permit Mass to be celebrated in any oratory found within a private house; that permission was now reserved to the Holy See. As a result, the effect of *Quanta cura* led to a distinction, hitherto unknown, between two types of oratories: those in which the bishop could permit the celebration of the Mass, and those in which he could not. Since he could not permit Mass anywhere in private homes, the distinction began to arise between oratories found in non-private edifices and those located in private homes. Eventually, these two types of oratories came to be known simply as public and private oratories.⁶

Almost immediately, questions began to arise. Especially prominent was the question of what distinguishes a non-private from a private residence. Trent mentioned only private houses in its decree, forbidding bishops to allow the celebration of the Mass within them; the Council never actually mentioned non-private houses. By logical deduction, however, if there are private houses, then there must also exist non-private houses, and under certain conditions a bishop could allow Mass to be celebrated in oratories located within such non-private houses. Consequently, the question became very important: What exactly constitutes a non-private house? Centuries of decisions from the Roman Curia dealt with exactly this question. The topic was still being discussed in 1897, when P. Gasparri succinctly summarized all of the relevant jurisprudence in his tract *De sanctissima Eucharistia*. He wrote: “If, however, one seeks what a *private house* is, according to the Council of Trent, ... we reply that these words are to be strictly interpreted ... to mean the dwelling of some individual or particular family, as distinct from a *common house* or public house, which is the dwelling of some community.”⁷

Following the promulgation of the 1917 Code, A. Feldhaus likewise summarized the jurisprudence in his 1926 study of the history and development of oratories. He noted that fairly early in the responses of the Roman Curia, it had become clear that non-private houses had to be “public” not only in

⁶ Feldhaus’ study provides an excellent history of the development of oratories. See A. FELSHAUS, *Oratories*, Canon Law Studies, no. 42, Washington, DC, The Catholic University of America, 1927.

⁷ Cf. P. GASPARRI, *Tractatus canonicus de Sanctissima Eucharistia*, Paris/London, Delhomme et Brigue, 1897, 142. Emphasis in the original.

name but also in fact. Unlike Gasparri, Feldhaus included a reference to the right of entry for all of the faithful in his description of public oratories, stating that “strictly public oratories, i.e., *such as were to be accessible to all the faithful*, had to possess an entrance from some public thoroughfare, or if the oratory could not be entered except through a courtyard or atrium, that at least this courtyard or atrium had to be open to the public.”⁸ Why did Feldhaus in 1926 include a reference to the right of entry, but Gasparri in 1897 did not? The answer is because that right was first clearly articulated for public oratories only in 1899.

The process which gave rise to that articulation took place over many years. For a long while, the Holy See had been granting exceptions to earlier prohibitions against allowing the celebration of the Eucharist in certain oratories, because the houses in which they were located fell into a sort of middle ground, neither truly public nor truly private. These included such places as oratories found in prisons,⁹ seminaries,¹⁰ hospitals,¹¹ and orphanages.¹² As the nineteenth century was drawing toward a close, there was a growing awareness that the traditional two-fold classification of oratories as either public or private was insufficient; a third classification was needed which was somewhere in between.

On 23 January 1899, the Sacred Congregation for Rites formally issued a decree identifying such a third class of oratories, referring to them as semi-public.¹³ The decree began by offering a more precise definition of public oratories and private oratories than had previously existed, and then it identified the new middle classification as “semi-public.” The decree established that “public oratories are those which, having been perpetually dedicated, blessed, or solemnly consecrated by the authority of the Ordinary for the public worship of God, have a door onto a street or an unhindered entrance, universally wide-open to the faithful from a public street.”¹⁴ By definition, then, public oratories had an unhindered public access open to the

⁸ FELDHAUS, *Oratories*, 59. Emphasis added.

⁹ Cf. SACRED CONGREGATION OF THE COUNCIL (= SCC), decree *Calaritana*, 14 November 1648, §2, ad 2, in P. GASPARRI (ed.), *Codicis iuris canonici fontes* (= *Fontes*), vol. 5, Typis polyglottis Vaticanis, Rome, 1930, no. 2686, 309.

¹⁰ Cf. SCC, decree *Viterbien.*, 16 May 1686, in P. GASPARRI (ed.), *Fontes*, vol. 5, Typis polyglottis Vaticanis, Rome, 1930, no. 2892, 401.

¹¹ Cf. SCC, decree *Viglevanen.*, 27 March 1847, §I, ad I, in P. GASPARRI (ed.), *Fontes*, vol. 6, Typis polyglottis Vaticanis, Rome, 1932, no. 4096, 378.

¹² Cf. *ibid.*, §II, ad II, 378.

¹³ SRC, decree, 23 January 1899, in I. SERÈDI (ed.), *Fontes*, vol. 8, Typis polyglottis Vaticanis, Rome, 1935, no. 6288, 343.

¹⁴ *Ibid.*

faithful; semi-public oratories did not. It was this 1899 definition of public oratories with its implicit reference to the right of entry—made explicit in 1917 in *CIC/17* canon 1188 §2, 1°—to which Feldhaus could refer in his 1926 description, but which had not yet been available to Gasparri in 1897.

2 — The Right of Entry in *CIC* 1917 and the Revision of the Code

At the time of the promulgation of the 1917 Code, the right of entry into churches had remained largely unchallenged for centuries, but the right of entry into oratories had experienced significant recent developments. Their distinct histories led to differing ways in which those rights were expressed in the Pio-Benedictine Code, from which was drawn forth the current formulation of the right in canon 1214.

2.1 — The Right of Entry in *CIC* 1917

As of 1899, the unhindered access of the faithful was the single feature which distinguished public from semi-public oratories. Since this distinction was quite new, it was necessary that it be clearly expressed in the new 1917 Code. As a result, this access for all of the faithful—a constitutive element of public oratories—was expressly articulated as a right of entering¹⁵ (*ius adeundi*) in *CIC/17* canon 1188 §2, 1°. According to that canon, an oratory would be “public, if it was principally erected for the convenience of some college or even of private persons, in such a way nevertheless that for all of the faithful there exists the right, lawfully established, of entering it (*ius sit, legitime comprobatum, illud adeundi*) at least during times of divine services” (*CIC/17* c. 1188 §2, 1°).

By way of contrast, the 1917 Code contained no explicit expression of the same right in regard to churches. Presumably, there was no need for such an expression, since no one seriously questioned the right. This does not mean, however, that the right of entry into churches was absent from the 1917

¹⁵ The verb *adire* conveys a sense of going to or visiting some place for a particular reason. Both *CIC/17* canon 1188 §2, 1° and canon 1214 of the present Code indicate that the purpose for approaching the church is to offer worship, which implies entering the church. *Ius adeundi* is translated as “the right of entry” in the *Code of Canon Law: Latin-English Edition, New English Translation*, prepared under the auspices of the CANON LAW SOCIETY OF AMERICA, Washington, DC, Canon Law Society of America, 1999, canon 1214.

Code. Instead, the right of entry was treated in *CIC/17* canon 1161, where the reference is implicit rather than explicit: “By the name church is understood a sacred building dedicated to divine worship, in order that, as its principal end, it might be of use by all of the Christian faithful for the public exercise of divine worship” (*CIC/17* c. 1161). The canon simply stated that the principal purpose of a church is its use by all of the faithful for the public offering of divine worship. Although the language of rights was lacking, the implied intent was not.

One other canon from the 1917 Code is essential for understanding the Pio-Benedictine sense of the right of entry, whether it be into public oratories or into churches. According to the provisions of the former Code, public oratories were to be governed by exactly the same laws as churches, unless otherwise indicated (cf. *CIC/17* c. 1191). This canon resulted in the fact that the only practicable difference in the 1917 Code between public oratories and churches was in the original purpose for which the building had been erected. Public oratories were originally constructed for the use of some group but at some point—often lost to history—they were handed over to the use of all of the faithful, whereas churches were intended for the use of all of the faithful from the very time of their construction. This distinction had no real practical consequence of any kind, a fact which was evident to the consultors at the time of the revision of the Code.

2.2 — The Right of Entry in the Revision of the Code

The revision of the canons dealing with churches and public oratories commenced in 1971. The consultors who dealt with the revision of that section of the Code were all members of the study group “*De locis et temporibus sacris*.” On 26 October 1971, they began to address the question of oratories and churches. Almost immediately, they noted that the distinction between public oratories and churches lacked any practical application. They quickly moved to do away entirely with the category of public oratories, thereby effectively turning all public oratories into churches. To this end, they began a discussion to merge *CIC/17* canon 1161 which defined churches with *CIC/17* canon 1188 §2, 1° which defined public oratories, creating from the merger a new hybrid canon which would serve as the new definition of an enlarged category of churches. The resulting draft of the new canon borrowed heavily from the 1917 definition of churches found in *CIC/17* canon 1161, but five words were lifted out of the definition of public oratories in *CIC/17* canon 1188 §2, 1° and were inserted into the new definition of churches: *omnibus fidelibus ... ius sit ... adeundi* ([such that] the right of

entering should be for all of the faithful).¹⁶ In effect, the consultors lifted the explicit articulation of the right of entry found in the 1917 Code's definition of public oratories and inserted it directly into the new definition of churches in what would eventually become canon 1214. For the first time in history, the right of entry—*ius adeundi*—would be explicitly stated in reference to churches.

One other significant thing occurred in merging *CIC/17* canons 1161 and 1188 §2, 1°. Not only did the consultors insert the explicit articulation of the right of entry into the new definition of churches, but they also intentionally removed a key restriction placed upon that right. The former Code had defined the right of entry in *CIC/17* canon 1188 §2, 1° as applicable only to times of divine services (*tempore saltem divinorum officiorum*). After one of the consultors had expressed his belief that such a restriction proper to public oratories was simply too limiting for churches, other consultors entered the discussion. The question of how—or even if—to restrict the right was a point of contention among the consultors.¹⁷ In the end they compromised, removing the reference to times of divine services and inserting instead the additional phrase taken from canon 1161: *ad divinum cultum publice exercendum* (for publicly exercising divine worship). In addition, *publice* was replaced by *publicum*, so that the canon now contained the well-established term *divinum cultum publicum* (public divine worship). This compromise oriented the right toward public divine worship but without expressly restricting it to times when such public divine worship would be occurring.¹⁸

On 15 November 1979 the overall draft of the new Code, including the draft of the new canon on churches, was sent throughout the world for comment from numerous groups including episcopal conferences, the canon law faculties of various pontifical universities, dicasteries of the Roman Curia, and others. After receiving the resultant feedback, the study group *De locis et temporibus sacris* met from 1 October to 6 October 1979 to review the comments concerning their work and to make necessary changes to their draft texts. On 3 October 1979 the group specifically addressed the question of the new definition of churches. Some of the consultors still questioned the wisdom of merging the entire category of public oratories into that of

¹⁶ PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW (= CODE COMMISSION). COETUS STUDII “DE LOCIS ET DE TEMPORIBUS SACRIS,” in *Communicationes*, 35 (2003), 66. The references in *Communicationes* are not consistent. For example, the same study group is referred to as a *coetus studii* and as a *coetus studiorum*. References will be made here exactly as they appear in *Communicationes*.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

churches. The decision from six years earlier held firm, but three modifications to the earlier draft of the canon were proposed and accepted. The first two changes were minor and did not affect the meaning of the canon. The first of these substituted the word *destinata* for *dedicata*, an alteration made necessary by the changed terminology used in the revised liturgical books.¹⁹ The second minor modification was the omission of the word *omnibus* from the phrase *omnibus fidelibus*, since the consultors felt that the lengthier expression was redundant.²⁰

The first two modifications were minor, but the third change resulted in an unprecedented expansion of the right of entry. At the 3 October 1977 meeting of the study group, it was clear that there was still some debate among the consultors as to how the canon containing the new definition of churches should express the right of entry for all of the faithful. Two objections were raised to the 1971 draft, which had stated that the right is intended for the exercise of public divine worship (*ad divinum cultum publicum exercendum*). The first objection centered around the fact that the whole concept of public divine worship was being widely debated at the time, and some of the consultors felt that it was not wise to set confusing parameters for a canonical right. There was not even a general agreement about what public divine worship was.²¹ The second objection arose from the opinion of a number of the consultors that “it did not seem equitable to limit the right of the faithful to enter a church only to times of divine services.”²² The debate about this point from 1971 had evidently not been resolved, and some of the consultors still felt that the right was being too narrowly defined. As a compromise, one of the consultors suggested that the word *praesertim* be inserted into the text, and that *publicum* should be changed back to *publice*. According to the proposal, the right of entry would extend *ad divinum cultum praesertim publice exercendum* (for the exercise, especially publicly, of divine worship). The consultors found this suggestion to their liking, and it passed unanimously.

¹⁹ Prior to Vatican Council II, the term “dedication” could refer both to persons and to things, which in turn were either consecrated or solemnly blessed. In light of the revision of the liturgical texts and a change in expression, “dedication” now refers only to things which have been truly consecrated and not merely blessed, e.g., certain churches.

²⁰ CODE COMMISSION. COETUS STUDIORUM “DE LOCIS ET DE TEMPORIBUS SACRIS DEQUE CULTO DIVINO,” in *Communicationes*, 12 (1980), 333.

²¹ For a consideration of the confusion to which the consultors were referring regarding what constitutes public divine worship, see E. LOHSE, *Restricting the Right of the Faithful to Enter a Church: Law and Jurisprudence*, Tesi Gregoriana, Serie diritto canonico, no. 204, Rome, Editrice Pontificia Università Gregoriana, 2016, 236-243.

²² CODE COMMISSION. COETUS STUDIORUM “DE LOCIS ET DE TEMPORIBUS SACRIS DEQUE CULTO DIVINO,” in *Communicationes*, 12 (1980), 333.

This compromise solution did more, however, than simply end the debate about how the new definition of churches should be expressed in the Code. It actually altered the right of entry itself. Because the word *especially* does not convey the sense of *exclusively*, the insertion of *praesertim* into the draft radically expanded the right of entry in ways never envisioned beforehand. In other words, by indicating that the right extended *especially* to the public exercise of divine worship, it follows logically from the insertion of *praesertim* that the right also extends to the private exercise of divine worship. With the promulgation of the new Code in 1983, canon 1214 obtained the force of law, and with it so did an expanded right of entry into churches for the offering not only of public but also of private divine worship.²³

3 — *The Objective Right of Entry in CIC 1983*

Before examining the right of entry into churches as it currently exists in the 1983 Code, it might be helpful to consider briefly the relationship between an objective right and its corresponding subjective right, so as to understand better the interplay between the right in itself and the freedom to exercise that right. Once having established that background, it will be possible to proceed to an examination of the objective right itself.

3.1 — *Interplay Between an Objective Right and its Corresponding Subjective Right*

Put into the simplest terms, an objective right is a *thing*, a tangible or intangible good which is owed to someone. It is the thing itself, that which is owed. An objective right is a static reality, defined by the Legislator. It does not require anything; it simply “is.” In reference to the present study, the objective right under examination is entry into a church for the offering of public and also of private divine worship, as defined by the legislator in canon 1214. Only the legislator can alter this objective right.²⁴

The very existence of an objective right like entry into a church gives rise to a corresponding subjective right to claim for one’s own that which is

²³ The only other change to the draft prior to the 1983 promulgation of the Code was the change in 1980 from the subjunctive *sit* to the indicative *est*, made possible by the fact that the earlier use of the preposition *ut* requiring the subjunctive had been removed from the canon in 1971.

²⁴ The legislator did in fact alter the right, through the insertion of *praesertim* in canon 1214 as noted above.

owed.²⁵ It is the subjective right which calls for action; a subjective right is ordered toward its exercise. That exercise in turn can be regulated or restricted as needed. *Acting to lay claim to what is owed is always an exercise of the subjective right.*

In contemporary thinking, many people give no thought to the objective right as a right per se; they think only of the subjective right which can be acted upon. This has led to a commonly held presumption that one has a right only when one can exercise it. The fact of the matter, however, is that objective rights endure, whether anyone acts upon a corresponding subjective right or not. For example, freedom of speech continues to exist as a fundamental objective right whether a government recognizes its existence or not. No matter how severely a government might restrict someone's subjective right to speak freely, actual freedom of speech—the very thing itself which is owed to persons—continues to exist as a fundamental objective right. No amount of restriction can diminish the objective right in any way. Freedom of speech—the very concept or reality itself—is an objective right. It is the thing which is owed. The capacity or authority to speak freely—to lay claim to what is owed, i.e., to act—is the corresponding subjective right. Everything that affects an individual's capacity or human faculty to exercise a right touches upon the subjective right, not the objective right.

With that as background, it is possible to proceed to a study of the objective right of entry as articulated in canon 1214, after which it will be possible to consider the various factors which affect the lawful or unlawful restriction of the exercise of the corresponding subjective right.

3.2 — The Objective Right of Entry in Canon 1214

The objective right of entry into a church is found in the 1983 Code's definition of a church, which states: "By the term church is understood a sacred building designated for divine worship to which the faithful have the right of entry for the exercise, especially the public exercise, of divine worship" (c. 1214).²⁶ The canon defines exactly what is owed to the faithful as

²⁵ J. Hervada describes a subjective right as an individual's faculty to do, omit, or to demand something. He indicates that of these three, the faculty to demand is the principal sense of a subjective right. Cf. J. HERVADA, *Cos'è il diritto? La moderna risposta al realismo giuridico*, Subsidia Canonica 10, Rome, Edizione Santa Croce, 2013, 41.

²⁶ Canon 1214 literally states: "... for exercising especially publicly divine worship" (*ad divinum cultum praesertim publice exercendum*). For this article, a smoother English translation is preferred which retains the same meaning: "... for the exercise, especially the public exercise, of divine worship."

an objective right. In simplest terms, it is entry into a church for the offering of divine worship, especially public but also private (c. 1214). To understand more precisely exactly what is owed to the faithful, it is necessary to ask the following three questions: 1) Where is this right applicable? 2) For whom is this right applicable? 3) What is the purpose toward which the right is directed?

3.2.1 — *Where is this Right Applicable?*

In some ways, the answer to this first question seems self-evident. The objective right of entry into churches applies, obviously, to churches. But what constitutes a church? Canon 1214 begins to answer this question by stating that a church is a sacred edifice destined for divine worship (*aedes sacra divino cultui destinata*). The former CIC/17 canon 1161 had used the term *dedicata* rather than *destinata*. *Dedicata* had a precise canonical meaning in the old Code, and it still does in the new Code, but the meaning is no longer the same. Whereas it had previously referred to a solemnly blessed or consecrated person or thing, it is now used in reference only to consecrated things. Thus, only one of its four prior applications from the Pio-Benedictine Code is still in use. Because a church can be not only a consecrated thing (to which *dedicata* would apply) but also merely a solemnly blessed thing (to which *dedicata* would no longer apply), it was necessary to change the terminology used in the definition of churches. Canon 1214 therefore speaks of churches as being “destined” for divine worship instead of dedicated. Unfortunately, the term “destined” does not convey any real canonical precision, and simply refers to the intended use of the edifice.²⁷

Unlike the term *destinata*, the phrase *aedes sacra* does convey canonical precision. Canon 1205 indicates that sacred places (*loca sacra*) are those which are designated (*deputantur*) for divine worship or for the burial of the faithful, either by dedication or by a blessing. Although the terminology has changed since the 1917 Code, the concept has not: a sacred place is given over to worship or to burial, either by being dedicated (consecrated, in the 1917 terminology) or by being solemnly blessed according to the liturgical books. It is important to remember that such dedications (consecrations) or solemn blessings are intended to be permanent and enduring.²⁸ By their very

²⁷ In fact, even oratories and private chapels can be “destined” for divine worship, without any requirement that they even be blessed, as canon 1229 indicates.

²⁸ Cf. A. VERMEERSCH – J. CREUSEN, *Epitome iuris canonici, cum commentariis ad scholas et ad usum privatum*, vol. 2, Mechlin/Rome, Dessain, 1940, 324. Cf. also F.X. WERNZ – P. VIDAL, *Ius canonicum*, vol. 4, Rome, Pontificia Universitas Gregoriana, 1934, 440-442.

nature as dedicated or solemnly blessed edifices, churches are not temporary structures. They are deputed for divine worship by dedication or blessing. If a structure has not been dedicated (consecrated) or solemnly blessed, it is not a church. The right of the faithful to enter it as expressed in canon 1214 would not apply.

3.2.2 — *For Whom is this Right Applicable?*

When the consultors decided in 1971 to merge public oratories with churches, they borrowed phrasing from *CIC/17* canon 1188 §2, 1° and inserted it into the new definition of churches. That phrasing had indicated that the right of entry would extend to all of the faithful (*ad quam omnibus fidelibus ius est adeundi*). In the 1977 redaction of the draft canon, the consultors chose to eliminate the word *omnibus*. They reasoned that the use of *omnibus* was redundant, since without any other descriptor, the term “the faithful” already indicates all of the baptized.²⁹ The omission of *omnibus* has not altered the meaning of the phrase in any way. M. Mosconi acknowledges this point when he writes, “as regards the subjects who may vindicate the right of access established by the canonical norm, it is a matter of the faithful, and therefore, according to the norm of canon 204, all of the baptized.”³⁰ Likewise, P. Malecha observes that “this right (*ius*) ... concerns the faithful, without distinction.”³¹ The right of entry on the part of all of the faithful without distinction is the central feature distinguishing churches from oratories and other sacred places in the new Code, whereas for oratories only those for whom the oratory is intended would possess the right to enter (cf. c. 1223). As J. Huels writes, “the principal juridical element defining a church—as distinct from an oratory (cf. c. 1223) or a private chapel (cf. c. 1226)—is the right of the faithful to go there.”³²

²⁹ Cf. CODE COMMISSION. COETUS STUDIORUM “DE LOCIS ET DE TEMPORIBUS SACRIS DEQUE CULTO DIVINO,” in *Communicationes*, 12 (1980), 333.

³⁰ M. MOSCONI, “A che ora apre la chiesa? Le disposizioni del can. 937,” in *Quaderni di diritto ecclesiale*, 16 (2003), 157. All translations from the Italian are the author’s own unless otherwise noted.

³¹ P. MALECHA, *Edifici di culto nella legislazione canonica: Studio sulle chiese-edifici*, Rome, Editrice Pontificia Università Gregoriana, 2002, 37.

³² J. HUELS, “Sacred Times and Places [cc. 1205-1253],” in CLSA *Comm*2, 1429. For examples of other canonists sharing this same point of view, see V. MOSCA, “I luoghi e i tempi sacri (cann. 1205-1253),” in *La funzione di santificare della Chiesa: XX Incontro di Studio, Passo della Mendola – Trento, 5 luglio – 9 luglio 1993*, prepared under the auspices of the GRUPPO ITALIANO DOCENTI DI DIRITTO CANONICO (ed.), *Quaderni della Mendola*, no. 2, Milan, Glossa, 1995, 203; J. FOSTER, “Canonical Issues Relating to the Civil Restructuring of Dioceses and Parishes,” in *The Jurist*, 69 (2009), 329 in note 41; L. CHIAPPETTA,

3.2.3 — *What Is the Purpose toward Which This Right Is Directed?*

This third question reveals the 1983 Code's true innovation concerning the objective right of entry, because the purpose toward which the right is directed has changed. Intentionality is a constitutive element of the objective right of entry. In other words, the objective right does not extend to entering a church for any purpose whatsoever, such as to take photos of the artwork, but only for the intention identified by the legislator. Prior to 1983, the objective right of entry into churches had been directed toward the exercise of public divine worship (cf. *CIC/17* c. 1161), and the objective right of entry into public oratories had been restricted to times of divine services (cf. *CIC/17* c. 1188 §2, 1°). As already noted, with the insertion of *praesertim* into the new definition of churches found in canon 1214, the scope or purpose toward which the right of entry is directed has been broadened to include not only public but also private worship. The constitutive element of intentionality has been changed, and with it the objective right itself has been modified.

The ramifications of this fact are significant. Prior to 1983, the faithful had no right of entry into a church for the offering of private prayer such as to make a pious visit to the Blessed Sacrament or to say the rosary. Correspondingly, the act of physically entering a church for such a purpose did not constitute an exercise of the subjective right to enter. One could enter under some other pretext, but canonically it would not be an exercise of the subjective right to enter. Following the promulgation of the 1983 Code, however, the faithful do have an objective right to make such devotional visits, and that right is clearly articulated in the law itself. As a result, now making such visits does constitute an exercise of the corresponding subjective right to enter, and if the faithful are denied that entry, they can make recourse to vindicate their right. Such a possibility did not exist under the 1917 Code.

Furthermore, any exercise of the subjective right to enter prior to the 1983 Code required the presence of some divine service being celebrated, which in turn more than likely required the presence of some member of the clergy.³³ After 1983, however, no such public worship is required. To exercise the subjective right, it is sufficient that a single member of the faithful enter to offer private prayer. Since in effect nothing more is required today for the exercise of the subjective right to enter other than that someone

Commentary on c. 1214, in F. CATOZZELLA et al. (eds.), *Il Codice di diritto canonico: Commento giuridico-pastorale*, vol. 2, 3rd ed., Trent, Edizione Dehoniane Bologna, 2011, 487-488; and MALECHA, *Edifici di culto*, 37.

³³ Not every act of public divine worship under the 1917 Code required the presence of the clergy. For further information, see LOHSE, *Restricting the Right of the Faithful*, 115-119.

unlock the church door, it has become far more difficult for competent authority to propose motivations which would justify restricting the exercise of the right, i.e., which would justify not unlocking the door. The full breadth of the ramifications of the insertion of *praesertim* into the definition of churches in canon 1214 with its expansion of the objective right to enter churches—and the simultaneous expansion of the subjective right arising from it—is only beginning to emerge in the Church.

4 — Norms Favoring the Exercise of the Subjective Right to Enter

Although the objective right of entry into a church remains in force until the legislator chooses to modify it, the exercise of its corresponding subjective right is often dependent upon certain conditions. For example, a member of the faithful is owed entry into a church for the offering of divine worship, a fact that remains true twenty-four hours per day. That same member of the faithful cannot exercise the corresponding subjective right by walking into the church, however, unless the door is open. Having the door unlocked is a necessary precondition for the exercise of the subjective right to enter. Conversely, locking the door restricts the exercise of that same right. To keep the church permanently locked altogether prevents the exercise of the subjective right, even though the objective right of entry remains firmly in place the whole time.

There are a number of canons in the 1983 Code which encourage or even require the doors of a church to be open, and which therefore provide this necessary precondition to enable the faithful to exercise their subjective right to enter a church for the offering of divine worship. Principally these canons deal with two areas: the reservation of the Blessed Sacrament and the observance of liturgical feast days.

4.1 — Reservation of the Eucharist

The reservation of the Eucharist in a church affects the exercise of the subjective right to enter that church because it requires or at least urges that the doors be open. It does so in two ways, each governed by its own canon. The first is the obligation to open the doors of a church for at least some hours each day if the Blessed Sacrament is reserved within the church (c. 937). The second is the recommendation—formerly an obligation—to observe annually some extended period of Eucharistic adoration in those

churches in which the Blessed Sacrament is habitually reserved (c. 942). Both of these canons are dependent upon canon 934 which deals with the reservation of the Eucharist, which is obligatory in some churches and can be done in others with permission.

4.1.1 — *Obligation or Permission to Reserve the Eucharist (c. 934)*

The Code distinguishes between those churches in which the Eucharist *must* be reserved and those churches in which the Eucharist *may* be reserved. According to canon 934 §1, 1°, the Eucharist must be reserved in every cathedral or its equivalent, in every parish church, and in the principal church or oratory attached to the house of a religious institute or society of apostolic life (c. 934 §1, 1°).³⁴

What about other churches in which there is no obligation to reserve the Eucharist? According to canon 934 §1, 2°, the Eucharist may be reserved with the permission of the local Ordinary in other churches not already mentioned in canon 934 §1, 1°. This is a considerable simplification of the norms found in the 1917 Code.³⁵ In another simplification, according to the 1917 Code such permission could only be given if Mass were celebrated in the church at least once per week, but the 1983 Code has lessened this expectation for the regular celebration of the Mass, which is now twice a month, and what had been a clear prerequisite in this regard expressed as “provided that” (*dummodo*, in CIC/17 c. 1265 §1) has now been replaced with “insofar as possible” (*quantum fieri potest*, in c. 934 §1, 2°).³⁶ The result of the revision of canon 934 is that, while the requirement to reserve the Blessed Sacrament in certain specified churches has largely remained the same, the permission to reserve the Blessed Sacrament in all other churches has been considerably simplified.

³⁴ Obviously, the right of entry into churches will not apply to oratories attached to houses of religious institutes or societies of apostolic life but only to churches attached to them.

³⁵ Except for collegiate churches, and subsidiary churches of a parish as of 1923, the former Code required an indult from the Holy See for permission to reserve the Eucharist in a stable manner in other types of churches, but that requirement has been abrogated with the promulgation of the new Code. As a result, no church anywhere today requires an indult from the Holy See for the stable reservation of the Eucharist. For the former law, see CIC/17 canon 1265 §§1-2 and also PONTIFICAL COMMISSION FOR THE AUTHENTIC INTERPRETATION OF THE CANONS OF THE CODE, response to dubium *De Ss.ma Eucharistia asservanda (can. 1265)*, 23 May 1923, in AAS, 16 (1924), 115.

³⁶ In choosing to grant or withhold permission, the local Ordinary can insist on the obligation of Mass at least twice a month, but the intent of the law is that he is not obliged to do so.

4.1.2 — *Requirement to open the doors (c. 937)*

The Code establishes that, “unless a grave reason prevents [it], a church in which the Most Holy Eucharist is reserved is to be open to the faithful for at least some hours daily, so that they might be quiet in prayer in the presence of the Most Blessed Sacrament” (c. 937). The obligation to open the church for some hours every day applies only to those churches in which the Eucharist is reserved. Conversely, the obligation would not apply in churches in which the Eucharist is not reserved.

The 1917 Code had required churches containing the reserved Eucharist to be open every day (cf. *CIC/17* c. 1266). In revising that canon, a number of the consultors were concerned about situations in which it would be difficult or even impossible to fulfill the obligation to open the church while at the same time maintaining proper safety and security, both for the church edifice and for the Eucharist itself. As a result of those concerns, canon 937 of the new Code contains a somewhat mitigated obligation, due to the insertion of the phrase *nisi gravis obstet ratio* (unless some grave reason prevents [it]). The presence of such a grave reason, e.g., a well-founded concern for security, would remove the obligation. This mitigated obligation has the potential to limit the exercise of the subjective right to enter, because if a church could remain lawfully closed, then the exercise of the subjective right to enter could be lawfully restricted.

The consultors made another change in their revision of the former *CIC/17* canon 1266. In addition to inserting the mitigating clause at the beginning of the canon, at the end of the canon they also added the purpose for keeping the church open: so that the faithful might spend time in prayer before the Blessed Sacrament (*ut coram sanctissimo Sacramento orationi vacare possint*). The text does not simply say *ut orare possint* (so that they might pray), but rather *ut orationi vacare possint* (so that they might be idle in prayer, or so that they might have time for prayer).³⁷ This particular choice of wording points toward time spent in personal and private prayer before the Eucharist, the very kind of private divine worship which canon 1214 now includes within the scope of the objective right of entry as a result of the insertion of *praesertim*. Thus, in canon 937 the consultors attempted to strike a balance, on the one hand acknowledging the difficult situation in which

³⁷ Among the possible ways of translating *vacare*, L. Stelten indicates “to have time for, to be idle.” C. Lewis and C. Short indicate “to be free to attend to, to have time for.” Cf. L. STELTEN, *Dictionary of Ecclesiastical Latin*, s.v. *vaco*, Peabody, Massachusetts, Hendrickson Publishers, 1995, 281; and C. LEWIS – C. SHORT, *A Latin Dictionary*, s.v. *vaco*, Oxford, Clarendon Press, 1962, 1950.

many church edifices find themselves today, and on the other hand still requiring that the faithful reasonably have daily access to the reserved Eucharist for the exercise of private divine worship. In its 2002 instruction *The Priest, Pastor, and Leader of the Parish Community*, the Congregation for the Clergy echoes this same attempt to balance realistic concerns with the pastoral need to promote devotional visits to the Blessed Sacrament. In its instruction, the Congregation notes that, “the practice of visiting the Blessed Sacrament should be strongly encouraged. To this end, churches should be kept open for as long as possible, and their opening times fixed and established.”³⁸

Striking this balance is not always easy. Who is competent to determine when a cause is sufficiently grave that it stands in the way of the faithful’s access to the reserved Eucharist? Canon 937 is silent on this point. Some canonists indicate that the parish pastor or rector of the church is competent,³⁹ while the Congregation for Bishops places some of the responsibility on the diocesan bishop. In its 2004 *Directory for the Pastoral Ministry of Bishops*, the Congregation for Bishops states:

With the greatest solicitude, [the diocesan bishop] should foster adoration of Christ our Lord, truly present in the Blessed Sacrament both within and outside [of] the Mass. In order to assist the devotion of the faithful, he should provide for churches to remain open, insofar as local custom and circumstances permit, giving careful consideration to security.⁴⁰

Like the instruction from the Congregation for the Clergy, this statement from the Congregation for Bishops is consistent with the intent of canon 937, indicating that the purpose for opening the church is to foster the devotion of the Christian faithful in the presence of the Eucharist, and that attention must be given to security concerns which, if left untended, could become one of the grave causes preventing the church from being opened on a daily basis.

³⁸ CONGREGATION FOR THE CLERGY, instruction *Il presbitero, pastore e guida della comunità parrocchiale*, 4 August 2002, no. 21, in *Enchiridion Vaticanum: Documenti ufficiali della Santa Sede*, Bologna, Edizioni Dehoniane Bologna, vol. 21, 531, English translation in *The Priest, Pastor and Leader of the Parish Community*, no. 21, Vatican City, Libreria Editrice Vaticana, 2002, 35.

³⁹ Cf., for example, J. McAREAVY, “Title III. The Blessed Sacrament,” in G. SHEEHY et al. (eds.), *The Canon Law: Letter & Spirit, A Practical Guide to the Code of Canon Law*, prepared by the CANON LAW SOCIETY OF GREAT BRITAIN AND IRELAND in association with the CANADIAN CANON LAW SOCIETY, Collegeville, MN, The Liturgical Press, 1995, 513; and MOSCONI, “A che ora apre la chiesa?” 157.

⁴⁰ CONGREGATION FOR BISHOPS, directory *Apostolorum successores*, 22 February 2004, no. 152a, in *Enchiridion Vaticanum*, vol. 22, 1190, English translation in *Directory for the Pastoral Ministry of Bishops*, no. 152a, Vatican City, Libreria Editrice Vaticana, 2004, 167-168.

For his part, J. McAreavy comments that although security concerns may render it difficult to open the church, they do not excuse the competent authority from finding some practical way around them. He writes: “The facile device of simply locking the doors of a public church each day immediately after the last morning Mass is wholly contrary to both the letter and the spirit of the Church’s law.”⁴¹ The faithful have an objective right of entry into a church for both public and private divine worship. Such a “facile device,” as McAreavy puts it, would run the risk not only of violating canon 937, but canon 1214 as well, and the faithful who perceive that the exercise of their subjective right to enter has been unlawfully restricted could seek to vindicate that right, by presenting recourse first to the Bishop and then to the Holy See.

4.1.3 — *Recommendation for prolonged adoration (c. 942)*

The obligation in canon 937 to open a church for at least some hours each day due to the presence of the reserved Eucharist is one of the two norms in the Code connecting the reserved Sacrament to the right of entry. The obligation—in truth now merely a recommendation—found in canon 942 for an annual prolonged period of Eucharistic adoration is the other.

Canon 1275 of the Pio-Benedictine Code had required that churches⁴² celebrate Forty Hours Devotions annually or, if that were not possible, then at least some period of prolonged adoration, even if it were not continuous.⁴³ The local Ordinary was responsible to see to it that at least this period of prolonged adoration took place. These obligations found in *CIC/17* canon 1275 were substantially modified in the revision of the Code. To begin with, the consultors removed any reference to Forty Hours Devotions. In addition, they took the reasons given in the former canon for interrupting the continuous adoration and now identified them instead as reasons for omitting the period of adoration altogether. The Code now states that a period of prolonged adoration is to take place annually “only if there is foreseen a suitable gathering of the faithful, and with the established norms having been observed” (c. 942). The obligation of the Ordinary to insure at least a prolonged period of Eucharistic adoration (*curet loci Ordinarius ut ...*) has

⁴¹ MCAREAVY, “Title III. The Blessed Sacrament,” 513.

⁴² Public oratories were also bound to this obligation, by virtue of *CIC/17* canon 1191.

⁴³ What many parishes called Forty Hours Devotions was actually the non-continuous period of prolonged adoration observed in lieu of the actual Forty Hours Devotions by exposing the Eucharist after morning Mass and reposing it in the evening, and beginning the same process all over again in the morning for the next two days.

been replaced by a mere recommendation (*commendatur ut ...*) without any reference to the local Ordinary.

Both of the obligations in canons 937 and 942 to unlock the doors of a church due to the presence of the reserved Blessed Sacrament have been lessened relative to those found in the 1917 Code. Grave causes may now prevent the daily opening of the church (c. 937), and the obligation for a prolonged period of adoration is now reduced to a recommendation (c. 942). Thus, even while the 1983 Code has broadened the right of entry through the insertion of *praesertim* in canon 1214, it has also reduced the occasions when the church doors must be unlocked. These two developments work in somewhat opposite directions by expanding the objective right itself on the one hand while simultaneously diminishing the opportunities to exercise its corresponding subjective right on the other. Somewhat ironically, under the new Code the faithful can now exercise their subjective right to enter a church simply by walking in to make a pious visit before the Blessed Sacrament, but they may be less likely to find an unlocked door through which to enter.

4.2 — Liturgical observances

In addition to the obligations to open the doors of a church due to the presence of the reserved Eucharist, the jurisprudence of the Holy See has recently reiterated another expectation which would require the doors to be open. That expectation had originally been expressed in *CIC17* canons 1167 and 1168 §2 but is now absent from the 1983 Code. These canons had required a liturgical observance of the anniversary of a church's consecration and the church's annual titular feast. Following the principle that liturgical norms should be suppressed from the Code,⁴⁴ the consultors had removed numerous canons, including canons 1167 and 1168 §2. The only comment made about the removal of these two canons was that "all of the consultors agree regarding the suppression of these canons because they deal with liturgical matters."⁴⁵

The expectations previously expressed in *CIC17* canons 1167 and 1168 §2 have reappeared in the jurisprudence of the Congregation for the Clergy, which has recently insisted upon the observance of both

⁴⁴ CODE COMMISSION. COETUS STUDII "DE LOCIS ET DE TEMPORIBUS SACRIS," in *Communicationes*, 35 (2003), 62.

⁴⁵ *Ibid.*, 69. For the full list of liturgical norms removed from the drafts of the revised Code, see CODE COMMISSION. OPERA CONSULTORUM IN APPARANDIS CANONUM SCHEMATIBUS "DE LOCIS ET TEMPORIBUS SACRIS," "Ex actis," in *Communicationes*, 4 (1972), 161.

the anniversary of a church's dedication as well as its titular feast.⁴⁶ Such an observance would require the doors to be open for the celebration of the liturgy. If the Congregation is going to continue to insist on these celebrations, it might be worth noting that the liturgical laws governing these observances are contained in nos. 59, 4b and 59, 4c of the *Roman Calendar*.⁴⁷ Only those churches which have been truly dedicated (i.e., consecrated in the 1917 terminology) would observe the anniversary of the church's dedication. By contrast, since every church is to have a proper title (cf. c. 1218), the titular solemnity would be celebrated in every church, regardless of whether it was dedicated or not.

There is one final point concerning liturgical observances. In 1989, the Congregation for Divine Worship and the Discipline of the Sacraments issued norms establishing that the following liturgical observances are to be celebrated every year in all minor basilicas: the Feast of the Chair of Peter on 22 February, the solemnity of Saints Peter and Paul on 29 June, and the anniversary of the election of the Roman Pontiff or the anniversary of the inauguration of his pontificate. Therefore, minor basilicas actually have three additional days annually in which the free exercise of the subjective right to enter is guaranteed for the faithful due to the obligation to observe a liturgical feast, and any restriction of the exercise of that right must yield to these norms which are specific to basilicas.⁴⁸

⁴⁶ Cf. CONGREGATION FOR THE CLERGY, decree, 26 January 2015, Prot. No. 20144216 (unpublished). See also LOHSE, *Restricting the Right of the Faithful*, 379 and 385.

Although canon 1167 §1 was removed from the drafts of the Code, the same expectation of the annual celebration of a church's dedication is also found elsewhere. In 1972, the Sacred Congregation for Divine Worship issued an explanatory note concerning the anniversary of a church's dedication. In it, the dicastery issued norms concerning the solemnity which is to be celebrated (*ad solemnitatem ... celebrandam*), indicating that the celebration should take place either on the anniversary itself, or on the Sunday closest to it if that Sunday falls within Ordinary Time, or on the Sunday before the Solemnity of All Saints. For churches whose date of dedication is unknown, either the Sunday before All Saints or October 25 may be chosen as a fixed date. Cf. SACRED CONGREGATION FOR DIVINE WORSHIP, explanatory note *De celebratione annuali dedicationis ecclesiae*, in *Notitiae*, 8 (1972), 103. In truth, these norms were not new. They were merely a restatement of numerous decisions of the competent Roman dicasteries even prior to the promulgation of the 1917 Code, and which remain in effect today (cf. c. 2) as articulated in the 1972 explanatory note.

⁴⁷ The *Roman Calendar* is one of the liturgical books ordered to be revised by the Fathers of Vatican Council II. The typical edition is *Calendarium Romanum ex decreto sacrosancti oecumenici concilii Vaticani II instauratum auctoritate Pauli pp. VI promulgatum*, Vatican City, Typis polyglottis Vaticanis, 21 March 1969.

⁴⁸ Cf. CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, decree *De titulo Basilicae Minoris*, no. III, 3, 9 November 1989, in AAS, 72 (1990), 439.

4.3 — Entrance without Payment (c. 1221)

The remaining canon in the 1983 Code which serves to guarantee, to some extent at least, the free exercise of the subjective right to enter a church for the offering of divine worship is canon 1221. Entrance during times of sacred celebrations (*tempore sacrarum celebrationum*) is to be free and gratuitous (*liber et gratuitus*), according to the canon (c. 1221). This wording is slightly different from that of *CIC/17* canon 1181 which had indicated that entrance for sacred rights (*ad sacros ritus*) was to be entirely gratuitous (*omnino gratuitus*), but the meaning in both versions is the same. During the revision of the canon, there was a proposal to strike the reference to sacred rights, which would essentially guarantee free entrance whenever the doors were opened, but the consultors rejected that proposal, since they acknowledged that there are times outside of the times of public divine worship when it would be permissible to charge an entrance fee.⁴⁹

Canon 1221, however, does not address the question of entrance for private worship. This is a significant omission, given the insertion of *praesertim* in canon 1214. The canon guarantees free and gratuitous entrance during the offering of public divine worship, but not for the offering of private worship. Along a similar line of thought, some canonists—among them Huels, Mosca, and especially Malecha—point out that canon 1221 must be read not only in conjunction with canon 1214, but also with canon 937. In particular, Malecha notes that “in a situation in which the schedule is reserved for visiting churches, [rectors and pastors] cannot forbid a person from entering there who wants to pray before the Most Blessed Sacrament.”⁵⁰ Even Malecha, however, limits his comments to entering during times of divine services or entering to pray before the Blessed Sacrament. What if the Blessed Sacrament is not reserved, and no services are underway? What if someone merely wants to light a candle or to pray at the shrine to Our Lady in a church where Mass is only celebrated occasionally and the Eucharist is not present? Canon 1221 is silent on this point, so that one is left with the situation of having the objective right to enter a church for private prayer even where the Eucharist is not reserved, but not having the lawful protection of free and gratuitous entrance.

⁴⁹ Cf. CODE COMMISSION. COETUS STUDII “DE LOCIS ET DE TEMPORIBUS SACRIS,” in *Communicationes*, 35 (2003), 289.

⁵⁰ MALECHA, *Edifici di culto*, 113.

4.4 — Ramifications of the Insertion of *praesertim* in Canon 1214

The insertion of *praesertim* into canon 1214 expanded in unprecedented ways the objective right of entry together with its corresponding subjective right to enter. Entry into a church to pray privately, even where the Blessed Sacrament is not reserved, is now part of what is owed to the faithful. Locking the doors of a church outside of the times of public worship in 1917 did not restrict the exercise of the subjective right to enter, but now it would. In other words, under the 1983 Code *simply to lock the door is to restrict the exercise of the subjective right to enter*.

The ramifications of this fact are significant: the faithful now have a far broader platform from which to present hierarchical recourse against the unlawful restriction of their subjective right to enter a church. Likewise, the competent authority may find it far more difficult under the current legislation to refuse access to a church, if the only thing needed for the faithful to exercise their right is for someone to unlock the door. The subjective right to enter a church for the offering of divine worship, however, is not an absolute right. The competent authority can place lawful restrictions upon its exercise. Although the faithful have broader grounds from which to launch a hierarchical recourse to vindicate their subjective right to enter a church, they will still have to prove that the restrictions placed upon the exercise of that right—many of them seemingly quite reasonable—are nonetheless unlawful.

5 — Norms Restricting the Exercise of the Subjective Right to Enter

Just as there are norms which favor the exercise of the subjective right to enter a church by requiring that the church door be open and accessible to the faithful, and that at least during times of divine services entrance must be free and gratuitous, there are also norms which limit or even prohibit the exercise of the right to enter. These norms have no bearing at all on the objective right of entry which continues undiminished, but they do affect the exercise of the subjective right and therefore must be taken into consideration.

Before looking at any individual norms, an initial observation might be helpful. The potential of these norms to limit or prohibit the exercise of the subjective right to enter a church has been greatly reduced in the 1983 Code, not because the norms themselves were altered, but because of the insertion of *praesertim* in canon 1214. For the most part, these norms regulate the offering of public divine worship. Today, however, the exercise of the

subjective right to enter a church is no longer dependent upon acts of public divine worship in which to participate. Nonetheless, even in the new Code limiting or prohibiting public worship can still serve to restrict the exercise of the subjective right, mostly because the doors of a church are less likely to be unlocked if there are fewer occasions for the offering of public divine worship. In short, then, although the effect of these norms in restricting the exercise of the subjective right to enter is greatly reduced, it is still possible. These norms deal with three areas: parochial rights, the violation of a church, and the application of penalties.

5.1 — Parochial Rights

The 1983 Code establishes that, “in a lawfully dedicated or blessed church, all acts of divine worship are able to be conducted, while preserving parochial rights” (c. 1219). Like the former Code, the current law still demonstrates a clear deference to parochial rights. But what are these parochial rights? The Pio-Benedictine Code identified parochial rights in *CIC/17* canon 462, wherein those functions were enumerated which were specifically reserved (*reservatae sunt*) to the pastor. The new Code treats this same topic in canon 530, but instead of listing functions specifically reserved to the pastor, the new Code speaks of seven functions which are especially entrusted (*specialiter commissae sunt*) to the pastor.⁵¹

These especially entrusted functions listed in canon 530 are the Code’s understanding of what constitutes parochial rights. They consist of those rights proper to the pastor and which he exercises in the parish church, or at least in a subsidiary church of the parish.⁵² It is true that canon 530 speaks of

⁵¹ According to Malecha, the change from “*reservatae sunt*” to “*specialiter commissae sunt*” has resulted in the fact that these functions are “reserved in a more tenuous form ... in the sense that they are not conceived as reserved personally to the pastor, but are entrusted, in a special way, to his office.” MALECHA, *Edifici di culto*, 94. The Congregation for the Clergy offers a similar explanation in its 2002 instruction, *The Priest, Pastor and Leader of the Christian Community*: “Rather than rights or duties given exclusively to the parish priest [USA = pastor] these functions are entrusted to him in a special way by virtue of his particular responsibility as parish priest. They should be consequently discharged personally, in so far as possible, or at least overseen by the parish priest.” CONGREGATION FOR THE CLERGY, *The Priest, Pastor and Leader*, no. 22, 37.

⁵² The meaning of *ecclesia paroecialis* is clear enough, referring to the church which is the seat of the parish, as in canon 934 §1, 1°, but what about *ecclesia paroeciae* such as in c. 1171 §1? Does it refer to the parish church properly speaking, or should the phrase be understood as referring to a (i.e. any) church of the parish? This question merits attention in light of the growing number of parishes having subsidiary churches.

the pastor, and not of the parish, so that one could argue that canon 530 deals with the rights of the pastor and not of the parish (i.e., parochial rights), but G. Nuñez points out that it is in the parish church that the pastor exercises his parochial ministry.⁵³ L. Chiappetta is even more explicit in connecting the rights of the pastor to the rights of the parish when he states that “the parochial rights are indicated in canon 530, with the title ‘functions entrusted to the pastor in a special way’.”⁵⁴ These seven functions are as follows:

1. The administration of baptism
2. The administration of the sacrament of confirmation to those who are in danger of death, according to the norm of canon 883, 3°
3. The administration of Viaticum and of the anointing of the sick, with the prescription of canon 1003 §§1-2 remaining in place, and the imparting of the apostolic blessing
4. The assistance at marriages and the nuptial blessing
5. The conducting of funeral rites
6. The blessing of the baptismal font during the Easter season, the leading of processions outside of the church, and [the imparting of] solemn blessings outside of the church
7. The more solemn Eucharistic celebration on Sundays and holy days of obligation (c. 530).

Of these seven functions, those which would normally take place within a church edifice are the administration of baptism (no. 1), assistance at marriages and the giving of the nuptial blessing (no. 4), the conducting of funeral rites (no. 5), the blessing of the baptismal font during the Easter season (no. 6, first part), and the more solemn Eucharistic celebrations on Sundays and holy days of obligation (no. 7). The administration of confirmation to those who are in danger of death (no. 2) and the administration of Viaticum and the anointing of the sick (no. 3) would normally take place outside of a church, given that more often than not they take place at the bedside of the infirm. Processions and solemn blessings outside of the church edifice (no. 6, second part) are obviously also included among the things which do not normally occur within a church.

⁵³ Cf. G. NUÑEZ, “Notas a propósito de dos decretos recientes de la Signatura Apostólica. Supresión de parroquias y reducción de una iglesia a un uso profano no indecoroso,” in *Ius canonicum*, 53 (2013), 287.

⁵⁴ CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, “Commentary on c. 1219,” 492. See also MALECHA, *Edifici di culto*, 93-94, and L. PEZZOTTI, “I rettori di chiese,” in *Quaderni di diritto ecclesiale*, 2 (1989), 176.

Of these seven functions, the only one which a rector of a non-parochial church can perform without the permission of the pastor is the celebration of the more solemn Eucharistic celebrations on Sundays and holy days of obligation (cf. c. 559). A rector is specifically prohibited from all of the other functions without first obtaining the permission or delegation of the pastor (cf. c. 558). For this reason, Chiappetta notes that despite the change in wording in canon 530 from functions being reserved (*reservatae sunt*) to functions being especially entrusted (*specialiter commissae sunt*), for all practical purposes the law has remained the same.⁵⁵

As already noted, the insertion of *praesertim* has greatly diminished the effect of parochial rights on the freedom to exercise the subjective right to enter a church. From the list of functions especially reserved to the pastor, it is clear that parochial rights are concerned with the offering of public divine worship. The offering of private prayer does not figure into parochial rights at all, and a pious visit by a member of the faithful who wishes to enter a church to pray before the reserved Blessed Sacrament, or even perhaps to make a visit to a shrine to light a candle in a church where the Eucharist is not reserved, will in no way infringe upon the observance of parochial rights. To put it another way, a concern for observing parochial rights will not prevent someone from unlocking the door of a church to let the faithful enter for private worship. What all of this means on a practical level is that when considering placing some possible restriction upon the exercise of the subjective right to enter a church, the competent authority will not be able to appeal to a concern for parochial rights in order to justify restricting the faithful's freedom to exercise their subjective right to enter a church, even a non-parochial church.

Two remaining canons are of interest concerning parochial rights. They actually have the potential to encourage rather than to limit the exercise of the subjective right to enter. First, unlike canons 558, 559, and 561 which restrict divine services in non-parochial churches under the care of rectors, canon 560 instead points in the opposite direction, giving the local Ordinary the authority to *require* the rector to provide certain functions, even certain divine services, if the Ordinary considers it opportune to do so. Furthermore, the Ordinary could order that the church be opened to various groups so that they might conduct liturgical celebrations. In this way, canon 560 gives the local Ordinary the authority to require situations which provide for the free exercise of the subjective right to enter.⁵⁶

⁵⁵ Cf. CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, Commentary on c. 530, 652-653.

⁵⁶ Chiappetta notes that this requirement on the part of a local Ordinary would, for all practical purposes, effectively render the rector's church to be the equivalent of a subsidiary church of the parish, although juridically the rector's church would remain a church within – but not of – the parish. Cf. CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, Commentary on c. 560, 684.

Lastly, the Code gives to clerical institutes of consecrated life permission to conduct sacred ministries in the churches entrusted to their care (c. 611, 3°). This norm does not actually require such sacred ministries; it merely permits them. This provision, therefore, has a potential to allow for the free exercise of the subjective right to enter by granting the permission necessary for public divine worship, the offering of which would require the church doors to be open. Unless the clerical institute chooses to act upon that permission, however, the effect of canon 611, 3° upon the free exercise of the subjective right to enter a church would remain at the level of unrealized potential.

5.2 — Violation of a Church

Like the concern for parochial rights, the violation of a church also has an effect on the exercise of the subjective right to enter a church. In the 1917 Code, *CIC/17* canon 1173 §1 had forbidden the celebration of divine services, the administration of the sacraments, and the burial of the dead in violated churches. The objective right of entry at that time extended only to entry for the purpose of offering public divine worship, and this canon entirely prohibited such public divine worship. As a result, the violation of a church effectively eliminated the possibility of exercising the subjective right to enter. One could not claim entry into a church to participate in an act of public divine worship if the public divine worship itself were completely forbidden.

In the new Code, the provision regarding violated churches and other sacred places is found in canon 1211, which states:

Sacred places are violated through gravely injurious actions having been committed there, causing scandal for the faithful, [and] which, in the judgment of the local Ordinary, are so grave and contrary to the holiness of the place, that it would not be permitted to exercise worship in them, until the injury would be repaired by means of a penitential rite according to the norm of the liturgical books (c. 1211).

Significantly, this canon does not distinguish in any way between public and private divine worship: all worship is prohibited. For this reason, the insertion of *praesertim* in canon 1214 has had no effect on way that the violation of a church entirely prohibits the exercise of the subjective right to enter churches. In the revision of the Code, both the prohibition concerning violated churches in canon 1211 and the right of entry in canon 1214 expanded in tandem to include private as well as public worship. As a result, both in the present as in the former Code, the violation of a church prohibits

all acts of worship included under the objective right of entry and its corresponding subjective right.

5.3 — Application of Penalties

The last set of norms from the 1917 Code touching upon the exercise of the subjective right to enter a church is different from those concerning parochial rights or violated churches for the simple reason that these norms, all of which deal with the application of penalties, no longer exist in the new Code.

Listed among the more detailed set of penalties found in the 1917 Code were two penalties which affected the right of the faithful to enter a church. They were the penalty of interdict *ab ingressu ecclesiae* (interdict from entrance into a church; cf. *CIC/17* cc. 2277, 2291, and 2329) and the penal transfer of a parochial see (cf. *CIC/17* cc. 2291 and 2292). As indicated in *CIC/17* canon 2291, which formed the introductory canon for both penalties, the penalty of interdict *ab ingressu ecclesiae* and the penal transfer of a parochial see were both vindictive penalties, or what today would be called expiatory. They could continue in force even after the guilty party had withdrawn from contumacy (cf. *CIC/17* c. 2286).⁵⁷

Regarding the first of these penalties, the interdict *ab ingressu ecclesiae* was imposed upon those who had violated a church. It forbade such persons from entering not only the church which they had violated but indeed any church during times of divine services.⁵⁸ Although these individuals could still enter a church at other times, the effect of the penalty was to eliminate any possibility of their exercising the subjective right to enter, since the exercise of that right was entirely dependent upon the presence of divine services. It is important to note the distinction: the interdict *ab ingressu ecclesiae* did not prevent the interdicted party from ever entering a church, but it did prevent that individual from entering the edifice on every occasion when either the objective right of entry or its corresponding subjective right

⁵⁷ In the 1917 Code, interdict more commonly had the nature of a censure, as in the current law. At times, however, interdict could be applied as a vindictive penalty, and such is the case indicated in the law for the interdict *ab ingressu ecclesiae*.

⁵⁸ See VERMEERSCH – CREUSEN, *Epitome iuris canonici*, vol. 3, 288. See also M. CONTE A CORONATA, *Compendium iuris canonici ad usum scholarum*, vol. 2, 4th ed., Turin/Rome, Marietti, 1951, 418; S. WOYWOD, *A Practical Commentary on the Code of Canon Law*, vol. 2, new revised edition, C. SMITH (ed.), New York/London, J. F. Wagner/B. Herder, 1948, 495; and G. MICHIELS, *De delictis et poenis*, vol. 3, Paris/Tournai/Rome/New York, Desclée, 1961, 316.

would apply. In the revision of the Code, however, the penalty of interdict *ab ingressu ecclesiae* was removed and there is nothing like it in the present Code.⁵⁹

Unlike the interdict *ab ingressu ecclesiae*, the penal transfer of a parochial see had a less drastic effect on the exercise of the subjective right to enter a church. The penalty removed the status of a parish church from a particular edifice, which thus rendered the building a subsidiary church, subject to all of the restrictions placed upon all subsidiary churches concerning the reservation of the Eucharist and parochial rights. It was in effect a demotion for the edifice itself and was applied for such things as the murder of the pastor or the harboring of heretics.⁶⁰

Even though churches no longer lose their parochial status due to the application of a penalty, they do still sometimes lose that status for other reasons, e.g., due to the merger of two parishes in which one church retains the status of a parish church and the other becomes a subsidiary church. Regardless of its reason, the loss of parochial status causes a church to be subject to all of the restrictions placed on subsidiary churches concerning parochial rights and reservation of the Eucharist. As noted above, however, the insertion of *praesertim* in canon 1214 has greatly diminished the potential of parochial rights to limit the exercise of the subjective right to enter a church. The removal of the obligation to reserve the Blessed Sacrament (cf. c. 934 §1, 1°), however, could have a real effect on the exercise of the subjective right to enter a “demoted” church. If the local Ordinary were not to grant permission to reserve the Eucharist in the now subsidiary church (cf. c. 934 §1, 2°), then the obligation to open that church for at least some hours every day would no longer apply (cf. c. 937). There could be numerous days when the doors of the church might remain locked, and this would have significantly restrict the freedom of the faithful to exercise their subjective right to enter the church.

Both of these penalties, the interdict *ab ingressu ecclesiae* and the penal transfer of a parish see, were removed from the Code. There is no longer any penalty in the 1983 Code which limits the exercise of the subjective right to enter a church for the offering of divine worship, whether public or private.

⁵⁹ The *Code of Canons for the Eastern Churches* (= CCEO) does still retain a penalty very much like the interdict *ab ingressu ecclesiae* found in the 1917 Code. That Code states: “Those who have been punished by a minor excommunication are deprived of the reception of the Divine Eucharist; in addition, they can be excluded from participation in the Divine Liturgy, and even more so from entrance into a church, if divine public worship is being celebrated within it (c. 1431 CCEO).”

⁶⁰ Cf. MICHIELS, *De delictis et poenis*, 386.

The loss of a church's parochial status however, even though now the result of an administrative act rather than the application of a penalty, may still result in notably diminished occasions for the free exercise of the subjective right to enter.

6 — Conclusion

The right of entry into churches, widely accepted and unchallenged since the time of Pope Gelasius, underwent substantial change in the revision of the Code, due to the merger of the entire category of public oratories into that of churches. As a result of that process, the objective right of entry into churches is now explicitly articulated in the law—in canon 1214 to be exact—for the first time in history. In the articulation of that right, an even more far-reaching modification took place. The new Code expands the scope of the objective right—the good itself which is owed to the faithful—to include not only the offering of public divine worship but private as well. Because a constitutive element of the objective right of entry is its intentionality, the insertion of *praesertim* in canon 1214 actually altered the objective right. Its intentionality was expanded to include entry for the purpose of offering especially public *but also private* divine worship.

This broadening of the objective right, and with it the simultaneous broadening of the corresponding subjective right to enter, constitutes a true innovation in the law, since never before did the right extend beyond times of public divine worship. Now, the faithful possess the right to enter a church not only to participate in public divine worship such as the celebration of the Mass, but also to make a private visit to the Blessed Sacrament or even to visit a church in which the Blessed Sacrament is not reserved. Several canons facilitate the exercise of the subjective right to enter by requiring the church to be open, either because of the presence of the reserved Eucharist or because of the requirement to celebrate certain liturgical observances. Likewise, some canons render it easier for the competent authority to restrict the exercise of that same right by reducing the times when the doors are required to be open out of a concern for parochial rights or the loss of the church's parochial status.

The overall effect of the broadening of both the objective right of entry and its corresponding subjective right is this: with the insertion of *praesertim* in canon 1214, all that is required for the faithful to exercise their subjective right to enter a church is that the door of the church be unlocked. There is no need for any member of the clergy to be present, for any public divine

services to be taking place, or for the Eucharist to be reserved within. Simply locking the door constitutes a restriction of the exercise of the subjective right to enter.

That subjective right is not absolute, however. Its exercise can be restricted, and numerous reasons exist for doing so, such as security and safety concerns, financial concerns, and others. In the end, the good which the competent authority is trying to protect by locking the door will need to be well founded, specific, and proportionate to the harm incurred on the part of the faithful by restricting the exercise of their subjective right to enter the church. The insertion of *praesertim* has clearly broadened the scope of the right and rendered it more difficult for the competent authority to justify locking the doors of a church.

MITIS IUDEX AND THE CONVERSION OF ECCLESIASTICAL STRUCTURES

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SUMMARY — The reforms of the matrimonial nullity process undertaken by Pope Francis call for a “conversion of ecclesiastical structures.” The implementation of the new procedural norms requires not only structural conversion of tribunals and diocesan structures but also intellectual conversion on the part of tribunal ministers. As some time has passed since the promulgation of the new norms, the content of these documents is examined with a specific focus on challenges related to practical implementation in local tribunals associated with the redefined roles of tribunal personnel. Various ambiguous and unintended aspects of the law also are examined in view of further procedural clarifications.

RÉSUMÉ — Les réformes de la procédure en nullité de mariage établies par le pape François appellent à « une conversion des structures ecclésiastiques ». La mise en œuvre des nouvelles normes de procédure exige non seulement une conversion structurelle des tribunaux et des organismes diocésains mais aussi une conversion intellectuelle de la part des ministres des tribunaux. Alors qu’un certain temps s’est écoulé depuis la promulgation des nouvelles normes, le contenu de ces documents est examiné avec une attention particulière aux défis reliés à la mise en œuvre en pratique dans les tribunaux locaux associée aux rôles redéfinis des membres du personnel de tribunal. Quelques aspects ambigus et inattendus de la loi sont considérés compte tenu des clarifications supplémentaires en matière de procédure.

In his apostolic letters *Mitis Iudex Dominus Iesus* and *Mitis et misericors Iesus*, Pope Francis called for a “conversion of ecclesiastical structures.”¹

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¹ FRANCIS, Apostolic letter *motu proprio Mitis et misericors Iesus*, 15 August 2015, in AAS, 107 (2015), 947. All English translations of this document are taken from the version published on the Vatican website at https://w2.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20150815_mitis-et-misericors-iesus.html (=MMI). IDEM, Apostolic letter *motu proprio Mitis Iudex Dominus Iesus*, 15 August 2015, in AAS,

In fact, in the promulgated Latin text of *Mitis Iudex* in the *Acta Apostolicae Sedis*, the word *conversio* is italicized for emphasis. This focus on conversion reflects *Evangelii gaudium*, in which the Holy Father described the need for “a missionary impulse capable of transforming everything, so that the Church’s customs, ways of doing things, times and schedules, language and structures can be suitably channeled for the evangelization of today’s world rather than for her self-preservation.”² Of course, no call to conversion is without challenges. As Beal has noted, “the unexpected appearance of Pope Francis’ apostolic letters *Mitis Iudex* and *Mitis et misericors Iesus* once again ‘upset the applecart’ for tribunals and necessitated yet another round of rethinking and retooling of their standard operating procedures.”³ Commentaries have abounded; indeed, in the months following the promulgation of these documents, there has been a flurry of articles, books, courses, and conferences. It is as if, as the Apostle Paul points out, “The old has passed away; behold, the new has come” (2 Cor 5:17).

Undoubtedly, Pope Francis’s call for conversion has resulted in the most dramatic overhaul of canonical structures in the modern era. However, mature organizations often suffer from structural inertia: “a resistance to change rooted in the size, complexity and interdependence in the organization’s structures, systems, procedures, and processes.”⁴ How has Pope Francis called tribunals to structural conversion? How can these changes be practically implemented? What challenges remain? What unintended consequences have resulted? This study will examine the reforms to the nullity process, with a focus on the practical application of the law in the tribunal setting, with a stated goal of effectively and faithfully implementing the revised canonical discipline of the Church. This study does not attempt to offer a comprehensive commentary on *Mitis Iudex*; instead, it focuses on those aspects calling for a true “conversion” of ecclesiastical structures.⁵

107 (2015), 960. All English translations of this document are taken from *Supplement to the Code of Canon Law Annotated*, Montreal, Wilson & Lafleur Ltée, 2016, 5-31 (=MIDI).

² FRANCIS, Apostolic exhortation *Evangelii gaudium*, no. 27, in AAS, 105 (2013), 1031. English translation “*Evangelii Gaudium: Apostolic Exhortation on the Preaching of the Gospel in Today’s World*,” 24 November 2013, <https://w2.vatican.va/content/Francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html>, accessed 3 February 2017.

³ John P. BEAL, “The Ordinary Process according to *Mitis Iudex*: Challenges to Our ‘Comfort Zone’,” in *The Jurist*, 76 (2016), 161.

⁴ Rebecca A. PROEHL, *Organizational Change in the Human Sciences*, Thousand Oaks, CA, Sage Publications, 2001, 43.

⁵ For a few of the recent book-length studies on *Mitis Iudex*, see Valerio ANDRIANO, *La normativa canonica sul matrimonio e la riforma del processo di nullità*, Vatican City, Libreria editrice Vaticana, 2016; Peter O. AKPOGHIRAN, *Mitis Iudex Text and Commentary*, New Orleans, Trans-

1 — The Organization of Tribunals

1.1 — The Structure of Tribunals

In *Mitis Iudex*, Pope Francis refers to the “principle of proximity.”⁶ This is not a new concept, as Pope Francis previously had lamented the fact that some of the faithful in his native Argentina have to take a day off from work and travel as much as 240 km to access a tribunal.⁷ In Canada, 240 km is trivial when a diocese such as Churchill-Baie d’Hudson covers over 2,300,000 km² of territory. However, Francis states clearly, “charity and mercy demand that the Church, like a good mother, be near her children who feel themselves estranged from her.”⁸ He envisions tribunals existing on a level more accessible to all the *christifideles* and, to this end, there are numerous provisions related to the structure of ecclesiastical tribunals. The law gives preference to the diocesan bishop establishing his own tribunal, while assigning him the “faculty” of approaching a nearby interdiocesan or diocesan tribunal.⁹ The *Sussidio* of the Roman Rota indicates this should only occur when it is impossible to establish a diocesan tribunal.¹⁰

Prior to *Mitis*, the diocesan bishop needed a rescript of the Apostolic Signatura to obtain the services of a neighbouring tribunal. This rescript would either erect an interdiocesan tribunal or extend the competence of an existing diocesan or interdiocesan tribunal.¹¹ The law now allows bishops in a single ecclesiastical province to undertake this on their own initiative.¹² The diocesan bishop is also free to withdraw from an interdiocesan tribunal on his own initiative.¹³ This should occur when participation in such a

figuration Press, 2016; P.M. DUGAN, L. NAVARRO, and E. CAPARROS (eds.), *The Reform Enacted by the m.p. Mitis Iudex: Commentaries and Documentation*, Montreal, Wilson & Lafleur, 2016; Kurt MARTENS (ed.), *Justice and Mercy Have Met: Pope Francis and the Reform of the Marriage Nullity Process*, Washington, DC, Catholic University of America Press, 2017.

⁶ *MIDI*, arts. 7, §1, 19.

⁷ FRANCIS, *Ad participes cursus de praxi canonica Tribunali Sacrae Romanae Rotae proveci*, 5 November 2014, in AAS, 106 (2014), 864.

⁸ *MIDI*, preamble.

⁹ *MIDI*, c. 1673, §2; *MMI*, c. 1359, §2.

¹⁰ APOSTOLIC TRIBUNAL OF THE ROMAN ROTA, *Subsidium for the Application of the M.p. Mitis Iudex Dominus Iesus*, Vatican City, January 2016, 17, note 21.

¹¹ JOHN PAUL II, Apostolic constitution on the Roman Curia *Pastor bonus*, 28 June 1988, in AAS, 80 (1988), 841-930, art. 124, nos. 3-4 (=PB). All citations from *Pastor bonus* are taken from the English translation in *Code of Canons of the Eastern Churches: Latin-English Edition, New English Translation*, Washington, DC, Canon Law Society of America, 2001, 771-843.

¹² *MIDI*, c. 1673, §2; *MMI*, c. 1359, §2.

¹³ *MIDI*, art. 8, §2; *MMI*, art. 8, §2.

tribunal is unnecessary and could hinder the faithful's access to justice by violation of the principle of proximity. Thus, the permission of the Signatura can no longer be thought of as a requirement of law. The ability to erect a diocesan tribunal has been described as a "free and inherent right" in the explanation of the *mens legislatoris*.¹⁴ However, while permission is not required, courtesy would indicate that the Signatura would be informed of these decisions to aid in their assigned task of maintaining vigilance over the administration of justice.¹⁵ It has been indicated that the approval of the Holy See is only required for the erection of interdiocesan tribunals involving multiple ecclesiastical provinces.¹⁶

A diocesan bishop now has numerous options. First, he can establish his own diocesan tribunal, whether his diocese lacks a tribunal or whether it is currently participating in an interdiocesan tribunal. If this is impossible, the diocesan bishop can turn to a neighbouring diocesan or interdiocesan tribunal in virtue of the faculty assigned to him by *Mitis Iudex*.¹⁷ The permission of the Holy See is only required if he wants to associate with an interdiocesan tribunal involving another ecclesiastical province.¹⁸ This permission would be obtained from the Apostolic Signatura.¹⁹

Mitis et misericors Iesus recognizes that the Eastern Churches have a particular need to establish tribunals. Pope Francis writes:

The synods of Eastern Churches [...] should respect the restored and defended right of organizing judicial power in their own particular churches. The restoration of the proximity between the judge and the faithful will never reach its desired result unless episcopal synods offer encouragement and assistance to individual bishops so that they may carry out the reform of the matrimonial process.²⁰

This ability to draw on neighbouring tribunals is of great assistance to Eastern Catholic Churches, especially those in the so-called diaspora. If an eparchy lacks a tribunal, it can now easily make use of another tribunal on a stable basis or associate with another eparchy to establish an intereparchial tribunal. There also remains the possibility of seeking assistance from another tribunal on an *ad hoc* basis, since if a diocesan or eparchial bishop

¹⁴ "La 'mens' del Pontefice sulla riforma dei processi matrimoniali," in *L'Osservatore Romano*, 8 November 2015, 8, no. 1.

¹⁵ *PB*, art. 124, no. 1.

¹⁶ "La 'mens' del Pontefice sulla riforma dei processi matrimoniali," 8, no. 2.

¹⁷ *MIDI*, c. 1673, §2; *MMI*, c. 1359, §2.

¹⁸ La 'mens' del Pontefice sulla riforma dei processi matrimoniali," no. 2.

¹⁹ *PB*, art. 124, nos. 3-4.

²⁰ *MMI*, preamble.

is able to do the greater (establish a stable competent tribunal), he can certainly do the lesser (designate a tribunal *ad causam*).²¹ In the case of a hypothetical Eastern Catholic eparchy in North America, this now allows their faithful to access tribunal justice by means of their bishop designating either a stable tribunal (such as a Latin tribunal near the eparchial see) or a tribunal *ad causam* (such as near the domicile of the parties, respecting the principle of proximity) without the intervention of the Signatura. This intervention previously was required for every instance of prorogation.

Finally, *Mitis Iudex* offers several observations regarding the structure of appeal courts. First, with respect to the court of second instance, both *Mitis Iudex* and *Mitis et misericors* point towards the metropolitan see as the proper second instance tribunal, a reflection of synodality and the metropolitan's role as head of the ecclesiastical province. "It is necessary that the appeal process be restored to the metropolitan see."²² This special function of the metropolitan should "be maintained and fostered."²³ The exhortation is obvious: a return to the metropolitan model should be advanced wherever possible. However, practical challenges remain. For example, in September 2016, the members of the Canadian Conference of Catholic Bishops voted to maintain a single national court of second instance.²⁴ While this is the established court of second instance for most Canadian first instance tribunals, the Ukrainian Catholic Church in Canada maintains a separate court of second instance, based on the metropolitan structure.

Additionally, the jurisdiction of the Roman Rota has been clarified. Prior to *Mitis et misericors Iesus*, it was debated whether the Rota served as a court of third instance for Eastern Catholics residing within the patriarchal territory, in virtue of *CCEO* c. 1063, §3.²⁵ This question is settled in *Mitis et*

²¹ Following the legal principle of "Plus semper in se continet, quod est minus." *RJ* in *VI*^o, no. 35, also *RJ* in *VI*^o, no. 53. This interpretation is shared by John Beal. See BEAL, "The Ordinary Process According to *Mitis Iudex*: Challenges to Our 'Comfort Zone'," 164.

²² *MIDI*, preamble, no. 5; *MMI*, preamble.

²³ *MMI*, preamble.

²⁴ CANADIAN CONFERENCE OF CATHOLIC BISHOPS, "Bishops give approval in principle to new resource for protection of minors, and encourage formation of a Catholic circle for relations with indigenous people," 30 September 2016 <<http://www.cccb.ca/site/eng/members/annual-plenary-assemblies/288-plenary-assembly-2016/4587-bishops-give-approval-in-principle-to-new-resource-for-protection-of-minors-and-encourage-formation-of-a-catholic-circle-for-relations-with-indigenous-people>>, accessed 4 February 2017.

²⁵ See, for example, JOBE ABBASS, "The Roman Rota and Appeals from Tribunals of the Eastern Patriarchal Churches," in *Periodica*, 89 (2000), 439-490; *contra*: JOAQUÍN LLOBELL, "La competenza della Rota Romana nelle cause delle Chiese cattoliche orientali," in *Quaderni dello Studio Rotale*, 18 (2008), 15-57.

misericors Iesus: “it is still necessary to retain the appeal to the ordinary tribunal of the Holy See, namely the Roman Rota, so as to strengthen the bond between the See of Peter and the particular churches.”²⁶ However, any rights cases connected to the marriage cases of Eastern Catholics that are appealed to the Roman Rota are to be transferred to the territorial tribunals of third instance.²⁷ This is a clear attempt to balance the right of appeal to the Rota with the principle of subsidiarity, which is implemented to a far greater degree in the Eastern Code.²⁸ This norm results in the conclusion that other types of cases appealed by Eastern Catholics to the Rota remain under the Rota’s jurisdiction.

1.2 — Financial Questions

Pope Francis’s call for updating ecclesiastical structures centers on promoting greater accessibility to the faithful, including offering nullity procedures without charge. As early as 2014, the Pope articulated his rationale for this desire: “When you attach economic interests to spiritual interests, it is not about God. The mother church has so much generosity it could offer justice free of charge, as we have been freely justified by Jesus Christ.”²⁹ In his matrimonial reforms, Pope Francis tasked episcopal conferences and Eastern synods to “ensure, to the best of their ability and with due regard for the just compensation of tribunal employees, that processes remain free of charge and that the Church, showing herself a generous mother to the faithful, manifest, in a matter so intimately tied to the salvation of souls, the gratuitous love of Christ by which we have all been saved.”³⁰

In response to this call, numerous dioceses have ceased charging fees for applying for a declaration of nullity, and the Roman Rota has modified its norms better to reflect the gratuitousness of the Gospel.³¹ Yet, many dioceses do not have the temporal goods necessary to provide a service free of charge. Dioceses need to challenge themselves to ask how to solicit appropriately and effectively voluntary donations in a manner that avoids the appearance

²⁶ *MMI*, preamble.

²⁷ FRANCIS, Rescritto *ex audientia SS.mi* sulla nuova legge del processo matrimoniale, in *L’Osservatore Romano*, 12 December 2015, 8, no. 5.

²⁸ The principle of subsidiarity is one of the listed guidelines for the revision of the *CCEO*. See PONTIFICAL COMMISSION FOR THE REVISION OF THE ORIENTAL CODE OF CANON LAW, Guidelines for the Revision of the Code of Oriental Canon Law, no. 6, in *Nuntia*, 3 (1976), 21.

²⁹ FRANCIS, *Ad participes cursus de praxi canonica Tribunali Sacrae Romanae Rotae propecti*, 865.

³⁰ *MIDI*, preamble; *MMI*, preamble.

³¹ FRANCIS, Rescritto *ex audientia SS.mi* sulla nuova legge del processo matrimoniale, no. 6.

of being a fee. For example, in Toronto, no fee has been charged in the modern history of the tribunal, yet voluntary donations still have increased markedly since the promulgation of the matrimonial reforms.

2 — *The Pre-Judicial Phase*

One innovation of *Mitis Iudex* is the codification of the pre-judicial inquiry. While this was occurring in numerous North American tribunals, the practice was not in universal law. The position was firm that this should occur by means of hired advocates, not tribunal officials.³² However, the new procedural norms indicate clearly that such an investigation is to occur, and advocates are now only considered as “perhaps” participating.³³ It is quite innovative that four articles of both *Mitis Iudex* and *Mitis et misericors Iesus* describe a practice that was, until recently, criticized by officials of the Holy See as helping parties obtain a declaration of nullity.³⁴ However, this new practice reflects the desire of the Synod of Bishops for pastoral accompaniment for divorced Catholics.³⁵ Three points related to this inquiry are established in the *motu proprio*.

First, the pastoral inquiry is to be available as part of diocesan parish structures.³⁶ Consequently, even in geographically large dioceses, there should be an accessibility to justice that respects the principle of proximity. This could be best demonstrated in a ministry to divorced and separated individuals at the parish level.³⁷ Individuals entrusted with the pastoral inquiry are to be approved for this function by the local ordinary; whether this will happen in practice remains to be seen.³⁸ Beal importantly notes that

³² DC art. 113 provides for “an office or person” who can explain the tribunal process, but there is no provision for the preparation of the writ of petition as in *MIDI*. The function of actually giving “help” to petitioners and respondents in tribunal processes, including the preparation of juridic acts such as the *libellus*, belonged to the competency of the advocate. See DC arts. 101, 104.

³³ *MIDI*, art. 4; *MMI*, art. 4.

³⁴ See, for example: Raymond Leo BURKE, “Some Current Tribunal Concerns of the Apostolic Signatura,” lecture, *Speculum Iustitiae* Conference, La Crosse, WI, 2 August 2013. Extensive criticisms of various elements of the preliminary phase in American tribunals have emerged in the jurisprudence of the Roman Rota and are summarized in William L. DANIEL, “Ongoing Difficulties in the Judicial Praxis of American Tribunals in Causes of the Nullity of Marriage,” in *The Jurist*, 74 (2014), 243-249.

³⁵ XIV ORDINARY ASSEMBLY OF THE SYNOD OF BISHOPS, Final report, 24 October 2015, no. 82, in AAS, 107 (2015), 1212-1213.

³⁶ *MIDI*, art. 2; *MMI*, art. 2.

³⁷ *MIDI*, art. 3; *MMI*, art. 3.

³⁸ *MIDI*, art. 3; *MMI*, art. 3.

the law does not envision this function as being entrusted to ministers of the tribunal itself.³⁹ The desired *vademecum* could be made available in such a fashion and offered on an interdiocesan level.⁴⁰

Second, this inquiry is to be made available to “those separated or divorced faithful who have doubts regarding the validity of their marriage or are convinced of its nullity.”⁴¹ This presumes that individuals understand that the nullity process is not an ecclesiastical divorce. However, this understanding is frequently absent, and the faithful often have no intention to obtain a document saying their marriage was null *ab initio*. In fact, some petitioners are opposed to this conclusion, with their only concern being permission for a subsequent marriage *in facie Ecclesiae*, reception into the Church, or entrance into a seminary, institute of consecrated life, or society of apostolic life.

Third, this inquiry is to be directed towards three elements. The first three of these elements are proximate ends: understanding the situation, gathering material for the eventual judicial process; and establishing whether both parties consent to the nullity of the marriage.⁴² This inquiry should aid the petitioner in identifying possible grounds of nullity, suitable proofs and knowledgeable witnesses. The desired final end of this process is the preparation of a petition to be presented to a competent tribunal.⁴³

3 — The Judicial Phase

3.1 — The Introduction of the Cause

The *Relatio synodi* of the third extraordinary general assembly of the synod of bishops requested a greater simplification of the nullity process.⁴⁴

³⁹ BEAL, “The Ordinary Process according to *Mitis Iudex*: Challenges to Our ‘Comfort Zone’,” 194. Tribunal ministers could aid in the formation of these individuals, as in one diocese where the *officialis* visited all priests to explain the new norms and the need for individuals to perform this important ministry.

⁴⁰ *MIDI*, art. 3; *MMI*, art. 3.

⁴¹ *MIDI*, art. 2; *MMI*, art. 2. It is notable that the language of the text explicitly indicates that a divorce or separation is to occur before this pre-judicial inquiry. Thus, the previous requirement for the judicial vicar to do all he can to encourage the re-establishment of a common life has been abrogated. See PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, *Instruction Dignitas connubii*, Vatican City, Libreria editrice Vaticana, 2005, art. 65 (=DC).

⁴² *MIDI*, arts. 2, 4; *MMI*, arts. 2, 4.

⁴³ *MIDI*, art. 5; *MMI*, art. 5.

⁴⁴ III EXTRAORDINARY GENERAL ASSEMBLY OF THE SYNOD OF BISHOPS, *Relatio Synodi*, 18 October 2014, no. 48, in AAS, 106 (2014), 904.

Pope Francis has seen the promulgation of *Mitis Iudex* in the context of a collegial action; this is a response of the *caput* of the college of bishops to the request of his brothers in the episcopacy.⁴⁵ The stated goal of this streamlining is speedy and simple decisions.⁴⁶ This simplification has been implemented at every stage of the matrimonial nullity process, and each element requires a continued “conversion” in terms of numerous elements of tribunal practice, such as modifying tribunal workflows and updating decrees that represent the new sequence of events.

3.1.1 — *The Competent Forum*

The new canon 1672 greatly simplifies the requirements of accepting a petition. While the law did favour the domicile of the respondent, this is no longer the case.⁴⁷ Concern has been expressed that this risks violating the right of defense; and Beal, citing the example of the American Procedural Norms, expresses concern that procedural abridgements may occur.⁴⁸

However, before this change in the law, numerous individuals were unable to approach an ecclesiastical tribunal because it was impossible to obtain the consent of the Judicial Vicar of the respondent. In the experience of the Archdiocese of Toronto, this frequently occurred with petitioners from China, Vietnam, Syria, Iraq, and numerous regions of South America. Some regions could take over a year’s time to receive the requested permission. Even European tribunals would not always respond or, even more incredulously, send a delegation for the tribunal *a quo* to proceed, in violation of the norm of law. While it was occasionally possible to proceed with a dissolution in these situations, this was not always the case. The faithful were left unable to access justice, stuck precisely in the situation condemned by Pope Francis, described as that where “the clouds of doubt overshadow the hearts of the faithful awaiting a decision regarding their state.”⁴⁹ If tribunals are proceeding in a responsible fashion, there is no more risk to denying the right of defense than that which existed previously, while the revised law allows a new group of individuals to access the tribunal system. It is a laudable practice for pastors of souls to revisit old cases where writs of petition were

⁴⁵ *MIDI*, preamble.

⁴⁶ *MIDI*, preamble.

⁴⁷ *CIC/83*, c. 1673.

⁴⁸ BEAL, “The Ordinary Process according to *Mitis Iudex*: Challenges to Our ‘Comfort Zone,’” 177-178. See also idem, “*Mitis Iudex* Canons 1671-1682, 1688-1691: A Commentary,” in *The Jurist*, 75 (2015), 475.

⁴⁹ *MIDI*, preamble.

rejected on grounds of non-competency and encourage petitioners to resume their investigation as part of the pastoral accompaniment they offer their faithful.

3.1.2 — *Accepting Cases: The Role of the Judicial Vicar*

Previously, a writ of petition was presented to a competent tribunal and the judicial vicar would decree the constitution of a tribunal. From this point onwards, the *praeses* or the *ponens* would direct various aspects of the process.⁵⁰ In practice, this means a writ of petition would be received, a case number assigned, and the case would then be assigned to a single sole judge or a college of judges. In the new procedure, the constitution does not occur until after the formulation of the doubt.⁵¹ This has numerous implications.

First, the judicial vicar can direct the initial stages of the investigation himself. The judicial vicar executes the citation by providing a copy of the petition to the defender of the bond and the respondent, unless the respondent is a co-petitioner⁵², by a decree “appended to the bottom of the *libellus* itself.”⁵³ It is worth noting that the previous norm of *Dignitas connubii* permitting withholding of the writ of petition no longer appears in the law.⁵⁴ A judicial vicar and his notary can quickly and effectively deal with these initial procedural steps, avoiding any feelings by the petitioner(s) that the case is languishing in ecclesiastical bureaucracy.

The judicial vicar has a greater responsibility and discretion in these actions. Now the judicial vicar cites the defender of the bond only at the stage of the initial citation, after admitting the petition.⁵⁵ Previously, it was recommended that the defender of the bond be consulted prior to issuing the decree accepting the petition.⁵⁶ This is no longer included in the law; the judicial vicar has responsibility for the citation.⁵⁷ After hearing the defender of the bond, the judicial vicar decides the appropriate ground for the formulation of the doubt and whether the ordinary or briefer form is to be used.⁵⁸ These are important decisions that are solely the purview of the judicial

⁵⁰ DC, arts. 118-142.

⁵¹ MIDI, c. 1676; MMI, c. 1362.

⁵² MIDI, c. 1676, §1; MMI, c. 1362, §1.

⁵³ MIDI, c. 1676, §1; MMI, c. 1362, §1.

⁵⁴ DC, art. 127, §3.

⁵⁵ MIDI, c. 1676, §1; MMI, c. 1362, §1.

⁵⁶ DC, art. 119, §2.

⁵⁷ MIDI, c. 1676, §1; MMI, c. 1362, §1.

⁵⁸ MIDI, c. 1676, §2; MMI, c. 1362, §2.

vicar, who answers for these decisions not only before the parties and his ordinary but also before God and his conscience. These initial stages will remind the judicial vicar that, as judge, he is, “so to speak, the law personified.”⁵⁹ The seriousness and frequency of his sole discretion in these initial decisions requires a new mindset in dealing with the stages leading up to the constitution of the tribunal.

3.1.3 — Constitution of Tribunals

The judicial vicar is responsible for constituting a tribunal, and the case is to be assigned to a college of judges or to a single clerical judge and two assessors.⁶⁰ With respect to collegial panels, two of the three judges may be lay persons, with a cleric as the *praeses*.⁶¹

The entrusting of a case to a single judge is now left to the discernment of the bishop-moderator of the tribunal, unlike the previous norm of canon 1425, §4, which gave the conference of bishops competence to decide whether to permit the diocesan bishop to utilize a single judge.⁶² However, two assessors are to be utilized with a sole judge whenever possible. These individuals need not be canonists and could be experts not only in juridical sciences but also in human sciences, such as a psychologist or cultural assessor.⁶³ This is an innovation to the matrimonial reforms, since the previous norms indicated simply to employ a single assessor when possible.⁶⁴

The innovations of allowing wider discretion to employ sole judges, assessors of various skills, and two lay judges all serve to accelerate the speed at which cases proceed to judgment.

3.2 — The Gathering of Proofs

The conversion for which *Mitis Iudex* calls is not simply structural but also intellectual. This emerges most especially in the revised canon regarding the probative value of declarations of the parties and witnesses. *Mitis Iudex* has departed from the tradition of skeptically receiving depositions of the parties or witnesses. Previously, these testimonies could not offer full proof

⁵⁹ ARISTOTLE, *Nicomachean Ethics*, V, iv, 7. This is taken up by Aquinas in *ST* IIa-IIae, q. 58, a. 1 ad 5.

⁶⁰ *MIDI*, c. 1676, §3; *MMI*, c. 1362, §3.

⁶¹ *MIDI*, c. 1673, §3; *MMI*, c. 1359, §3.

⁶² *MIDI*, c. 1673, §4; *MMI*, c. 1359, §4; *DC*, art. 30, §2.

⁶³ *MIDI*, c. 1673, §4; *MMI*, c. 1359, §4.

⁶⁴ *DC*, art. 30, §3.

unless circumstances suggested otherwise. Now, they can offer full proof unless they are weakened by various factors.⁶⁵ The default approach is now one of acceptance, not skepticism. This requires a radically new sense of thinking for canonists who were trained under the norms of the 1983 Code. In particular, defenders of the bond will need to be more accepting of a single testimony when credibility is well established. The fact that the depositions of the petitioner, respondent, and witnesses can have full probative value also means that in a circumstance where the petitioner and respondent are clearly manifesting proofs that establish nullity, a single witness could suffice. This can be a great assistance in cases that were previously more difficult to examine in the judicial forum due to a limited number of witnesses.

3.3 — The Documentary Process

Canons 1688-1690 of *Mitis Iudex* maintain the familiar documentary process in largely the same manner as was presented in the 1983 Code and *Dignitas connubii*.⁶⁶ The text in *Mitis et misericors Iesus* is nearly identical to that in *Mitis Iudex*.⁶⁷ Previously, the documentary process was not necessary for those “who would have been obliged to observe the prescribed form for the celebration of marriage required by law, but who attempted marriage before a civil official or a non-Catholic minister, the pre-nuptial investigation mentioned in can. 784 suffices to prove his or her free status.”⁶⁸ This canon has been eliminated; and the Pontifical Council for Legislative Texts has replied privately that, as a result, the documentary process must be used for so-called lack of form cases: “the nullity of the previous marriage must be declared while observing the norms of the new can. 1374 on the documentary process.”⁶⁹

The reasonableness of this conclusion may be questioned. First, one can note that there is no canon in the Latin Code providing an exception to the requirement of using the documentary process as was present in *CCEO* canon 1372, §2. This practice is based on an authentic interpretation of canon 1686 of the 1983 Code.⁷⁰ The Pontifical Council has indicated that

⁶⁵ *MIDI*, c. 1678, §§1-2; *MMI*, c. 1364, §§1-2.

⁶⁶ *CIC/83*, cc. 1686-1688; *DC*, art. 295-299.

⁶⁷ *MIDI*, cc. 1688-1690; *MMI*, cc. 1374-1376.

⁶⁸ *CCEO*, c. 1372, §2.

⁶⁹ PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Private reply of 25 November 2015 (Prot. N. 15170/2015), English translation in *The Jurist*, 76 (2016), 288.

⁷⁰ See PONTIFICAL COMMISSION FOR THE AUTHENTIC INTERPRETATION OF THE CODE OF CANON LAW, Authentic interpretation, 11 July 1984, no. 2, in *AAS*, 76 (1984), 747.

this authentic interpretation remains in force for the revised norm of *Mitis Iudex*.⁷¹ Therefore, what the Pontifical Council has indicated can be summarized as follows: i) the new canon 1688 of *Mitis Iudex* continues to allow for so-called lack of form cases to be dealt with using the prenuptial investigation, not the documentary process; and ii) the nearly identical canon 1374 of *Mitis et misericors Iesus* does not continue to allow for so-called lack of form cases to be dealt with using the prenuptial investigation. The contrast between the two positions is obvious, and it is even starker when one recalls the norm of *Dignitas connubii* art. 16. If a Latin tribunal is investigating a marriage of Eastern Catholics, the Latin tribunal uses its own procedural laws, along with the Eastern substantive law.⁷² Since canon 1688 of the Latin Code relates to procedural law, a Latin tribunal can declare an Eastern “lack of form” case without the documentary process, whereas an Eastern tribunal would require the documentary process! One can ask whether it was the intent of the legislator to make these individuals go through a more complicated documentary process when the stated goal of these reforms is to simplify the nullity process. Surely this is a situation of unintended consequences emerging from an omission in legal drafting.

3.4 — The Sentence

Numerous members of the third extraordinary assembly of the synod of bishops manifested their desire to eliminate the requirement of the double conforming sentence.⁷³ Given that the double conforming sentence was inserted as a guard to protect the indissolubility of marriage, this proposal was not without controversy.⁷⁴ Yet, Pope Francis has determined that the automatic transmission of the records of the case to the court of second instance for confirmation is unnecessary. In fact, the first fundamental criterion in his reform states: “First of all, it seemed that a double conforming decision in favor of the nullity of a marriage was no longer necessary to enable the parties to enter into a new canonical marriage. Rather, moral certainty on the part of the first judge in accord with the norm of law is sufficient.”⁷⁵ As a result, the new canon eliminated the requirement for an

⁷¹ PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Private reply of 18 November 2015 (Prot. N. 15182/2015), English translation in *The Jurist*, 75 (2015), 669.

⁷² *DC*, art. 16, §2.

⁷³ III EXTRAORDINARY GENERAL ASSEMBLY OF THE SYNOD OF BISHOPS, *Relatio Synodi*, no. 48.

⁷⁴ See, for example, Raymond Leo BURKE, “Canonical Questions regarding the Proposed Pastoral Care of the Faithful Who Are Divorced and Have Attempted Marriage,” in *The Jurist*, 75 (2015), 282-283.

⁷⁵ *MIDI*, preamble, no. 1; see also *MMI*, preamble.

automatic appeal, and decisions are effective once fifteen days has passed.⁷⁶ The petitioner, the respondent, the promoter of justice and the defender of the bond retain the right to appeal.⁷⁷

These new norms offer numerous implications for tribunal praxis. First of all, it is clear that the fifteen days allotted for lodging an appeal is to be counted as useful time.⁷⁸ The period of useful time begins from the time of legitimate publication, which is understood in the law as handing over a copy of the sentence to the parties.⁷⁹ Second, one must be able to determine when this publication has occurred to know when the *tempus utile* begins. This means that tribunals must re-evaluate their procedures for publishing sentences to satisfy the requirements of the law. Cases need to be published in a manner that is valid, and someone must determine on which date the document was received, so as to determine at what point the sentence becomes effective. Of course, the need to publish the sentence applies to the defender of the bond and, when applicable, the promoter of justice, who must be given the opportunity to read the sentence. The defender can appeal within the indicated useful time.⁸⁰

Further, the audience of the sentence is clearly the parties or their advocates, since the court of second instance will only receive a minority of cases. While previously the *ponens* would know that other canonists would be reading his sentence, this is no longer the case. The parties are the clear recipients of the published sentence and, in most cases, they will be the only individuals doing so. As a result, the *ponens* should write in a clear manner that is accessible and intelligible to the parties.

4 — *The Appeal*

While the mandatory transmission of all affirmative decisions for mandatory appeal has been eliminated, *Mitis* is clear that the right to appeal remains. This appeal can be launched by the petitioner, the respondent, the promoter of justice, or the defender of the bond⁸¹ within the pre-emptive period of fifteen useful days.⁸² Therefore, there is a responsibility not only to make the

⁷⁶ *MIDI*, c. 1679; *MMI*, c. 1365.

⁷⁷ *MIDI*, c. 1680; *MMI*, c. 1366.

⁷⁸ *CIC/83*, c. 1630; *CCEO*, c.1314.

⁷⁹ *CIC/83*, c. 1615; *CCEO*, c. 1297.

⁸⁰ *MIDI*, c. 1680; *MMI*, c. 1366.

⁸¹ *MIDI*, c. 1680; *MMI*, c. 1366.

⁸² *CIC/83*, c. 1630, §1; *CCEO*, c. 1311.

publication in line with the law of the Church but to ensure the parties are aware they can appeal.

Certainly, numerous cases being spared from a mandatory second instance review was welcomed by many first instance judicial vicars. At the same time, there is a concern expressed by numerous commentators that the lack of the mandatory appeal will risk a loss of “quality control.”⁸³ However, those who have worked in tribunals understand that second instance courts were frequently far from an effective means of quality control; instead, they were often expensive rubber stamps. Certainly, Pope Francis is calling us to conversion on this question. If we are running responsible and well-formed first instance tribunals, the loss of the double conforming sentence should not result in the end of well-founded decisions.

However, even well-reasoned judicial decisions can admit errors, and this is one of the reasons appellate courts exist. When evaluating tribunal structures, two important structural changes can greatly remove the risk of an erroneous decision. First, the law sees collegial judging as the ordinary course of action.⁸⁴ Sole judge tribunals are to occur by exception, with the help of assessors.⁸⁵ Tribunals should strive to use collegial judgments as much as possible, as this ensures two other canonists are reviewing the acts of the case and should identify any serious irregularities that could result in an erroneous sentence. Numerous dioceses have ended sole judging since the implementation of the Franciscan procedural reforms.⁸⁶

A second way to avoid erroneous decisions and pre-emptively reduce the number of appeals is by following the norm of law with respect to the intervention of the defender of the bond. The defender is to be present at numerous stages of the investigation: to comment on the writ of petition,⁸⁷ to comment prior to the formulation of the doubt regarding the ground and which procedure to be followed,⁸⁸ to be present at the depositions and view gathered proofs before publication,⁸⁹ and to offer observations prior to the sentence.⁹⁰ If the defender is responsibly exercising his or her role during

⁸³ See, for example, Thomas John PAPROCKI, “Implementation of *Mitis Iudex Dominus Iesus* in the Diocese of Springfield in Illinois,” in *The Jurist*, 75 (2015), 598.

⁸⁴ *MIDI*, c. 1673, §3; *MMI*, c. 1359, §3.

⁸⁵ *MIDI*, c. 1673, §4; *MMI*, c. 1359, §4.

⁸⁶ See, for example, PAPROCKI, “Implementation of *Mitis Iudex Dominus Iesus* in the Diocese of Springfield in Illinois,” 598-599. This is also the case in the Archdiocese of Toronto.

⁸⁷ *MIDI*, c. 1676, §1; *MMI*, c. 1362, §1.

⁸⁸ *MIDI*, c. 1676, §2; *MMI*, c. 1362, §2.

⁸⁹ *MIDI*, c. 1677, §1; *MMI*, c. 1363, §1.

⁹⁰ *CIC/83*, c. 1606; *CCEO*, c. 1289.

these stages, there should be no surprise appeals after publication of the sentence. Judges and judicial vicars need to respect the conscience of the defender of the bond and respond to expressed concerns during the investigation. Certainly, many tribunals employ “off-site” defenders who see the case for the first time after the decree of conclusion. While this may be a necessity for some tribunals, it should be an exception. The law clearly envisions the defender participating at numerous stages, and this is only possible when the defender not only can access the tribunal but also has a case load that is not burdensome and gives time for this activity. When the defender identifies areas of concern and the judge-instructor addresses them in a reasonable fashion, the defender should have no reason to appeal, except in very rare situations, and certainly never have a reason to lodge a plaint of nullity. It can be difficult to explain to the parties why the defender has appealed a case and further prolonged their tribunal experience. The balance between the vicar’s oversight and the defender’s freedom of conscience will need to be sought after. While the law envisions this occurring, the reality can be quite different. This, too, calls for a true conversion of ecclesiastical structures.

A word must also be said about the tribunal to which the appeal is directed. Previously, the majority of second instance tribunals in North America functioned using standard forms and decrees.⁹¹ With only a small minority of cases being admitted to ordinary examination, second instance tribunals were able to confirm decrees using pre-written confirmation decrees that were simply modified for subjective details. Judicial vicars of first instance tribunals were accustomed to receiving envelopes full of decrees where nothing differed beyond the names of the parties, dates, and protocol numbers. There is a risk in thinking that the removal of the mandatory appeal results in the practical end of the court of second instance and if, for example, five percent of cases were now appealed, the court could run with five percent of resources and staff. An examination of *Mitis* quickly demonstrates the error of this thinking. Outside of appeals determined to be dilatory, the appeals tribunal has lost the ability to confirm by decree.⁹² This means that the majority of appeals will be admitted to ordinary examination. The revised

⁹¹ For more on this topic, see William L. DANIEL, “Ongoing Difficulties in the Judicial Praxis of American Tribunals in Causes of the Nullity of Marriage,” 256-257. The Roman Rota’s practice is markedly different. Statistics on their judgments from 2000 to 2012 can be found in idem, “An Analysis of Pope Francis’ 2015 Reform of the General Legislation governing Causes of Nullity of Marriage,” in *The Jurist*, 75 (2015), 452. During this twelve-year period, 74.6% of rotal cases were admitted to ordinary examination.

⁹² *MIDI*, c. 1680, §§2-3; *MMI*, c. 1366, §§2-3.

law indicates that an appeals tribunal is to proceed “in the same manner as the first instance with the appropriate adjustments.” For second instance tribunals to effectively implement this requirement, staff and funding must be comparable to a first instance tribunal.⁹³

5 — *The Briefer Process Before the Bishop*

One of the most criticized elements of the Franciscan procedural reforms is the abbreviated process judged by the bishop. Indeed, Pope Francis himself recognizes this can lead to abuses.

Nevertheless, we are not unaware of the extent to which the principle of the indissolubility of marriage might be endangered by the briefer process; for this very reason we desire that the bishop himself be established as the judge in this process, who, due to his duty as pastor, has the greatest care for catholic unity with Peter in faith and discipline.⁹⁴

As one commentator has pointed out, certainly expressing the feelings of numerous other jurists: “Prior to the project of this reform, one could not have imagined such a risk being voluntarily taken (*motu proprio*) by the Supreme Pontiff, guardian of the Christian family on earth.”⁹⁵ One notes an entire body of literature emerging that is taking as strict a reading as possible of the briefer process.⁹⁶

Several points can be made about the briefer process. First, scholars must recognize that the experience of all tribunals is not equal. The cases encountered by a large metropolitan tribunal are radically different from the sorts of cases encountered by rural American dioceses. While one should not risk being overly ethnocentric in our approach to marriage, considering its institution as a natural reality common to all peoples and willed by the Creator, there does remain the fact that basic human freedoms are lacking in many parts of the world that are represented in higher proportions in certain

⁹³ *MIDI*, c. 1680, §3; *MMI*, c. 1366, §3.

⁹⁴ *MIDI*, preamble, no. 4.

⁹⁵ DANIEL, “An Analysis of Pope Francis’ 2015 Reform of the General Legislation Governing Causes of Nullity of Marriage,” 448. Daniel lists numerous possible risks associated with the briefer form.

⁹⁶ See, for example, William L. DANIEL, “The Abbreviated Matrimonial Process before the Bishop in Cases of ‘Manifest Nullity’ of Marriage,” in *The Jurist*, 75 (2015), 539-559; and Ronny E. JENKINS, “Applying Article 14 of *Mitis Iudex Dominus Iesus* to the *processus brevior* in Light of the Church’s Constant and Common Jurisprudence on Nullity of Consent,” in *The Jurist*, 76 (2016), 231-265.

metropolitan centres. For example, in 2015, the Toronto Regional Tribunal had a case of the impediment of abduction. Each year in Toronto, there are several “shotgun” weddings that literally involve firearms, most often with immigrants from the Middle East. While these are certainly a small minority of cases, it was often an absurdity that a marriage that was manifestly null could take longer to investigate than the couple’s common life lasted!⁹⁷ The use of the briefer process is a gift to tribunals that struggled to minister to these faithful in a responsible and effective manner. Acceptance by some canonists that this process is part of the law of the Church is part of the needed conversion to which Pope Francis calls us.

It is no secret that the briefer process can be abused, just as the ordinary process was abused in numerous locales prior to the most recent reforms. To avoid these abuses, checks can be easily implemented into the briefer process to ensure a more accurate decision. In the ideal case, the bishop himself would not only be a canonist but one with tribunal experience. There are numerous dioceses in North America in which the diocesan bishop or an auxiliary bishop directly participates in tribunal ministry on a stable basis.⁹⁸ In these cases, he would have a suitable understanding of the jurisprudence related to the cases and could implement the consistent teaching of the Church related to the validity of marriage.⁹⁹ However, this is not the case in all dioceses. To aid in this challenge, it would be most suitable for all involved (that is, assessor, case instructor, and even potentially the notary) to be decreed canonists. If the assessor and case instructor are both canonists, in addition to the defender of the bond (who is intimately involved in the process) and the judicial vicar (who determines the suitability of employing the process and likely will review the case prior to its submission to the bishop), a case is read by four canonists prior to its submission to the diocesan bishop for his judgment. This number is no different than an ordinary case judged by a collegial panel in the ordinary process.

The Supreme Tribunal of the Apostolic Signatura ultimately has the responsibility for ensuring the proper administration of justice.¹⁰⁰ While the

⁹⁷ Out of the approximately 350 cases accepted in 2006 in the Archdiocese of Toronto, eight went to the briefer form, seven of which were judged by the archbishop.

⁹⁸ See, for example, PAPROCKI, “Implementation of *Mitis Iudex Dominus Iesus* in the Diocese of Springfield in Illinois,” 599.

⁹⁹ The need to follow acceptable jurisprudence may seem self-evident, but that may not always be obvious to a non-canonist. Jenkins examines jurisprudential issues related to the briefer process at length in Ronny E. JENKINS, “Applying Article 14 of *Mitis Iudex Dominus Iesus* to the *processus brevior* in Light of the Church’s Constant and Common Jurisprudence on Nullity of Consent,” 231-265.

¹⁰⁰ *PB*, art. 124, no. 1.

double conforming sentence may have had this practical result, this is not the responsibility or the role of a second or third instance tribunal but the exclusive competence of the Signatura. To this end, in recognition of the major reorganization of the nullity process, there has also been a revisiting of the way the annual report to the Apostolic Signatura is completed.¹⁰¹ This new report includes detailed questions regarding the briefer process before the bishop. It is certainly appropriate for the Signatura to inquire if, for example, a relatively small diocese has significantly more briefer cases than a relatively large diocese, or if many cases fall under grounds considered more difficult to establish using the briefer process (such as c. 1095, 2°). It is certain that in some cases correction will be required, and the Signatura will exercise its proper function to ensure the correct administration of justice. It is noticeable that, in the revised report, the Apostolic Signatura also distinguishes to which tribunal a defender is appealing.¹⁰² Will it be frowned upon for a defender to appeal directly to the Roman Rota? Time will be needed to establish the *praxis curiae* on these topics.

In Canada, the first and second instance tribunal systems are, nearly without exception, interdiocesan (called “regional”). While various discussions have occurred at different tribunals, it seems this is unlikely to change in the foreseeable future. The Apostolic Signatura rightly distinguishes the report on briefer cases handled by the diocesan tribunal and those handled by the interdiocesan tribunal.¹⁰³ Of course, to complete this report it must be assumed that the interdiocesan tribunal follows the norms for interdiocesan tribunals issued by the Signatura, that is, that writs of petition are directed towards the central office, which may or may not instruct the case in the originating diocese.¹⁰⁴

There are some procedural issues when interdiocesan tribunals are involved with the briefer process. Strictly speaking, in these cases the Judicial Vicar of the interdiocesan tribunal receives the petition and determines whether it seems suitable for the briefer process, at which time it would be

¹⁰¹ SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Circular letter *Inter munera*, 30 July 2016, Prot. N. 51716/16 VT, 30 July 2016, English translation Circular Letter on the State and Activity of Tribunals, 30 July 2016, http://www.vatican.va/roman_curia/tribunals/apost_signat/documents/rc_trib_apsig_doc_20160730_inter-munera_en.html, accessed 3 February 2017.

¹⁰² *Ibid.*, 7.

¹⁰³ *Ibid.*, 6-7.

¹⁰⁴ SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, *Normae pro Tribunalibus interdiocesanis vel regionalibus aut interregionalibus*, 28 December 1970, art. 12, in *AAS*, 63 (1971), 490. English translation “Norms for Interdiocesan or Regional or Interregional Tribunals,” in *CLD*, 7, 923.

transferred to the originating diocese, the judicial vicar of which may or may not have an ecclesiastical office in the regional tribunal. It is even possible that the judicial vicar of the interdiocesan tribunal would transfer the case to himself as judicial vicar of the diocese.¹⁰⁵ If the case is judged by the diocesan bishop of the originating diocese, the decision becomes effective or is appealed by the parties. If the case is decreed back to ordinary examination, it is transferred back to the judicial vicar of the interdiocesan tribunal, who would then constitute a tribunal.

In the year since *Mitis* was implemented, various issues have arisen using the briefer process. As with any law, understanding the law is one thing, but implementation carries with it other challenges. For example, we can consider a hypothetical briefer case joined under canon 1103. The petitioner, sixteen years old and pregnant, was kicked out of her home and told she can return when she is married. Despite her pastor's best efforts to dissuade her from marriage, he is not successful. All is documented. The respondent was faced with a homeless girlfriend and did what he felt was necessary. The circumstances seem manifest and proofs are readily available. The respondent consents to the petition for nullity and the judicial vicar determines the briefer process should be used. The doubt is formulated on canon 1103 for both the petitioner and respondent. However, at the session for the gathering of proofs it becomes evident that, while the petitioner married to remove the extreme reverential fear from her father, the respondent was not faced with that same fear and instead married to help the petitioner. While his consent may be invalid, it may not necessarily be so under the joined issue. At the same time, the petitioner's consent is manifestly invalid.

What is the appropriate action? Does the diocesan bishop judge on the established ground on the petitioner and not propose the second ground on the respondent? Does the diocesan bishop remit the process to ordinary examination for judgment, eventually for an affirmative on the one ground and negative on the second? A third option, namely judging the petitioner in the affirmative and remanding the second ground to ordinary examination may seem ridiculous, but this position could be taken. The canons indicate that the bishop judges "if moral certitude regarding the nullity of marriage is reached."¹⁰⁶ While we would assume this means moral certitude regarding the nullity of marriage upon which the doubt was formulated, this is not explicit. This is just one of many situations where the canons are not explicit

¹⁰⁵ While this conclusion follows the norms, it is made obvious by the structure of the annual report. See SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Circular letter *Inter munera*, 6-7.

¹⁰⁶ *MIDI*, c. 1687, §1; *MMI*, c. 1373, §1.

regarding the necessary course of action. It is obvious that, as time passes and the Apostolic Signatura becomes more aware of how these norms are being implemented, a subsequent revision or even simply a procedural instruction similar to *Dignitas connubii* will be necessary. The conversion of ecclesiastical structures is clearly an ongoing process.

6 — Conclusions

Mitis Iudex Domini *Iesus* and *Mitis et misericors Iesus* call for a conversion of ecclesiastical structures. Beyond this, they demand a conversion of tribunal ministers to be open to the mind of the legislator and faithfully implement the norms of the Church. At the same time, in a spirit of seeking the truth, we have a duty to identify those processes that need further development and refinement – *Ecclesia semper reformanda*. Pope Francis himself admits this task. In March 2016, he told those of us gathered at the Roman Rota: “It is important that the new norms be adopted and further developed, in merit and in spirit, especially by those working in ecclesiastical Tribunals, in order to render the service of justice and love to families.”¹⁰⁷ It is in this spirit that we should examine how we have implemented the conversion to which Pope Francis calls us and, being faithful to Peter as well as the universal and unbroken teaching regarding the indissolubility of marriage, continue to identify those processes that need continued refinement for the greater promotion of the salvation of souls.

¹⁰⁷ FRANCIS, Address of His Holiness Pope Francis to Participants in the Course Promoted by the Roman Rota, 12 March 2016, in S.A. EUART, J.A. ALESANDRO, and T.J. GREEN (eds.), *Roman Replies and CLSA Advisory Opinions*, Washington, DC, CLSA, 2016, 64.

PUBLIC JURIDIC PERSONS AND CHAPTER 11 REORGANIZATION BANKRUPTCY

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SUMMARY — Reorganization bankruptcy in the United States allows civilly incorporated entities to retain both ownership and control of their assets while reorganizing their debts. For civilly incorporated public juridic persons in financial distress in the United States, the filing of reorganization bankruptcy should be considered a viable option under both canon law and civil law. While the 1983 *Code of Canon Law* does not mention it, reorganization bankruptcy should fall under canon 1295. This article proposes that the precautions stipulated for transactions under canon 1295 (acts of extraordinary administration and acts of alienation of ecclesiastical goods) can be applicable to a bankruptcy filing. With the inclusion of reorganization bankruptcy among transactions under canon 1295, civilly incorporated public juridic persons could, under both canon law and civil law, retain ownership and control of their assets while reorganizing their debts and be accountable to their creditors.

RÉSUMÉ — La faillite de réorganisation aux États-Unis permet aux entités incorporées civilement de conserver à la fois la propriété et le contrôle de leurs actifs tout en réorganisant leurs dettes. Aux États-Unis, pour les personnes morales publiques civilement incorporées qui sont en détresse financière, le dépôt d'une faillite de réorganisation devrait être considéré comme une option viable en vertu du droit canonique et du droit civil. Bien que le *Code de droit canonique* de 1983 ne le mentionne pas, la faillite de réorganisation pourrait être régie par le canon 1295. Cet article propose que les mesures stipulées pour les transactions que l'on retrouve au canon 1295 (actes d'administration extraordinaire et d'aliénation de biens ecclésiastiques) peuvent s'appliquer à un dépôt de faillite. En incluant la faillite de réorganisation parmi les transactions du canon 1295, les personnes juridiques

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publiques incorporées civilement pourraient, en vertu du droit canonique et du droit civil, conserver la propriété et le contrôle de leurs actifs tout en réorganisant leurs dettes et en rendant des comptes à leurs créanciers.

Introduction

According to the 1983 *Code of Canon Law*,¹ public juridic persons are erected by competent ecclesiastical authority. Endowed with the right to acquire, retain, administer and alienate ecclesiastical goods, public juridic persons receive their mission from the Church, speak in the name of the Church, and make available their ecclesiastical goods to further the mission of the Church.² In the United States, administrators of public juridic persons generally have the option to be incorporated under civil law. As civil corporations,³ these institutions are afforded the same legal rights and protections that other corporations have under civil law, including the right to file for reorganization bankruptcy under Chapter 11 of *Title 11* of the federal Bankruptcy Code.⁴

Civilly incorporated public juridic persons in the United States are accountable to both canon law and civil law. Conforming to canon law,

¹ *Codex iuris canonici auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus*, Libreria editrice Vaticana, 1989, English translation, *Code of Canon Law: Latin-English Edition, New English Translation*, prepared under the auspices of the Canon Law Society of America, Washington, DC, Canon Law Society of America, 1999 (= *CIC/83* or the Code).

² D.S. LOURDUSAMY, “Canonical Perspective on Social Justice and Charity,” in *Studia canonica*, 49 (2015), 490. Cf. J.J. CONN, *Catholic Universities in the United States and Ecclesiastical Authority*, JCD diss., Rome, Editrice Pontificia Università Gregoriana, 1991, 37-39; cc. 116 and 1254. Unless otherwise specified, all canons are taken from the *CIC/83*.

³ A public juridic person has no recognized right or legal capacity to incorporate in the United States. Rather, an individual natural person (e.g., an administrator of a public juridic person) can file certificates of incorporation, articles of incorporation, and bylaws which create the civil corporation that corresponds to the public juridic person. Furthermore, even after an administrator civilly incorporates a public juridic person, it is the civil corporation that is recognized under civil law of the United States, not the juridic person as such (which continues to be recognized under canon law). For the purpose of this work, a public juridic person which has been civilly incorporated in the United States will be referred to as a “civilly incorporated public juridic person.”

⁴ *11 U.S.C.*, available at: <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title11/pdf/USCODE-2013-title11.pdf> (2013) (last accessed 25 February 2017), (= the Bankruptcy Code or *Title 11*). Chapter 11 is a chapter of *Title 11* of the Bankruptcy Code that permits reorganization bankruptcy under federal bankruptcy law. Chapter 11 is available at: <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title11/pdf/USCODE-2013-title11-chap11.pdf> (last accessed 25 February 2017), (= Chapter 11, Chapter 11 bankruptcy, or reorganization bankruptcy).

public juridic persons are “constituted by competent ecclesiastical authority so that, within the purposes set out for them, they fulfill in the name of the Church, according to the norm of the prescripts of the law, the proper function entrusted to them in view of the public good.”⁵ Moreover, unless otherwise stipulated, public juridic persons are perpetual once erected.⁶ In essence, public juridic persons have both an incentive and an obligation to remain intact and to continue their ministries in the name of the Church indefinitely.⁷

In the United States, civil corporations are accountable to civil law. Although there are some exemptions because they are religious-based corporations (e.g., tax exemption), simply being public juridic persons associated with the Catholic Church does not exempt these institutions from having to follow civil law, particularly the laws of torts and negligence.⁸ The sexual abuse scandal of recent memory involving some Catholic clerics in the United States demonstrates the implication of what it means for public juridic persons to be held accountable to civil law. As a consequence of litigation related to this scandal, a number of Catholic institutions have had to liquidate a great deal of their assets to cover legal fees and to settle claims.⁹

⁵ C. 116.

⁶ Cf. c. 120.

⁷ M.M. MOREY and J.J. PIDERIT, *Catholic Higher Education: A Culture in Crisis*, New York, NY, Oxford University Press, Inc., 2006, 201. Cf. W.J. RADEMACHER, J.S. WEBER, and D. MCNEILL, *Understanding Today's Catholic Parish*, New London, CT, Twenty-Third Publications, 2007, 107-111; P.J. GONSORCIK, *The Canonical Status of Separately Incorporated Healthcare Apostolates in the United States: Current Status and Future Possibilities for the Public and Private Juridic Person*, PhD diss., Ottawa, Saint Paul University, 2001, 87.

⁸ C.P. WELLS, “Churches, Charities, and Corrective Justice: Making Churches Pay for the Sins of Their Clergy,” in *Boston College Law Review*, 44 (2003), 1214. Cf. I.C. LUPU and R.W. TUTTLE, “Sexual Misconduct and Ecclesiastical Immunity,” in *Brigham Young University Law Review*, 5 (2004), 1797-1883; P. JENKINS, *Pedophiles and Priests: Anatomy of a Contemporary Crisis*, New York, NY, Oxford University Press, Inc., 1996, 15, 125-138. Tort is defined as “[A] civil wrong other than breach of contract, for which a remedy may be obtained, [usually] in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to another person.” B.A. GARNER and H.C. BLACK (eds.), *Black's Law Dictionary*, 10th ed., St. Paul, MN, West Group, 2014, 1717. William Rademacher and colleagues write: “‘tort’ is a catch-all for many different forms of civil action, each with its own rules regarding liability, defenses, and damages. Torts may be intentional or unintentional. [...] Unintentional torts are grouped under the general heading of negligence. Negligence is probably the most common claim made in the civil law arena. It involves failure to meet required standard of care in a wide variety of situations.” RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish*, 145.

⁹ JENKINS, *Pedophiles and Priests: Anatomy of a Contemporary Crisis*, 126. Cf. P. DOYLE, “Resurrection: The Archdiocese of Boston Rebuilds,” in *Boston Magazine*, November 2012, available at: <http://www.bostonmagazine.com/2012/10/archdiocese-catholic-church-rebuild-after-scandal/4/> (last accessed 3 March 2016).

It has been noted that the sexual abuse scandal has cost the Catholic Church in the United States close to three billion dollars.¹⁰

Unequivocally, persons and organizations responsible for any atrocious act against vulnerable persons should be held accountable to both canon law and civil law.¹¹ However, to use ecclesiastical goods to pay for damages is incompatible with canon law. The Code distinctly states that the purposes of ecclesiastical goods are divine worship, the care and the decent support of the clergy and other ministers, and works of the sacred apostolate and charity.¹² To use ecclesiastical goods to settle civil litigation would go beyond the scope and the purposes intended by canon law.¹³ How should Catholic institutions in the United States follow the mandates of canon law (particularly regarding the care of ecclesiastical goods) while also being held accountable to their creditors?

This article proposes that public juridic persons that have been civilly incorporated should file for reorganization bankruptcy under Chapter 11 of the Bankruptcy Code when faced with insurmountable pressures from

¹⁰ N.M. GAUNCE and R. LUTHER, "Deliver Us from Evil: Why Bankruptcy Judges May Properly Rely on the Free Exercise Clause & RFRA to Protect Church Property from the Grasps of Tort-Creditors," in *Valparaiso University Law Review*, 43 (2009), 641. Cf. J.R. FORMICOLA, *Clerical Sexual Abuse: How the Crisis Changed U.S. Catholic Church-State Relations*, New York, NY, Palgrave Macmillan, 2014, 137; LUPU and TUTTLE, "Sexual Misconduct and Ecclesiastical Immunity," 1792.

¹¹ LUPU and TUTTLE, "Sexual Misconduct and Ecclesiastical Immunity," 1820. It is worth noting that some Church officials have expressed that the "clergy sex abuse [should be seen as] a matter of sin, a moral failing that is best addressed by Church doctrines of repentance and forgiveness, rather than as a crime or a civil wrong to be turned over to the secular justice system." LYTTON, "Clergy Sexual Abuse, Tort Law Making Policy," 846. This article, however, does not share that view.

¹² Cf. G.J. ROCHE, "The Poor and Temporal Goods in Book V of the Code," in *The Jurist*, 55 (1995), 313; FORMICOLA, *Clerical Sexual Abuse: How the Crisis Changed U.S. Catholic Church-State Relations*, 140; c. 1254. Furthermore, Sahayaraj Lourdusamy writes: "If [ecclesiastical] goods were to be allocated to or used for objectives other than the Church's proper objectives [that is, those articulated in canon 1254], they would lose their status as ecclesiastical goods." LOURDUSAMY, "Canonical Perspective on Social Justice and Charity," 491.

¹³ D.J. MARCINAK, "Separation of Church and Estate: On Excluding Parish Assets from the Bankruptcy Estate of a Diocese Organized as a Corporate Sole," in *Catholic University Law Review*, 55 (2006), 858. Cf. P.J. BROWN, "The Perils of Bankruptcy: Rights and Obligations Regarding Clergy Support," in *Studia canonica*, 45 (2011), 46; N.P. CAFARDI, "The Availability of Parish Assets for Diocesan Debts: A Canonical Analysis. (Symposium: Bankruptcy in the Religious Non-Profit Context)," in *Seton Hall Legislative Journal*, 29 (2005), 372; T. REESE, "Extending the Statute of Limitations," in *National Catholic Reporter*, 16 June 2016, available at <http://ncronline.org/blogs/faith-and-justice/extending-statute-limitations> (last accessed 17 February 2017).

claimants and creditors and when their stable patrimonial condition is at risk.¹⁴ In particular, reorganization bankruptcy is a sound strategy¹⁵ because it permits civilly incorporated public juridic persons to achieve three principal goals: 1) to remain intact to continue their work in the name of the Church; 2) to ensure that adequate precautions can be taken to protect their patrimonial condition; and 3) to compensate creditors equitably.¹⁶

1 — *Ecclesiastical Goods in the CIC/83*

Ecclesiastical goods can be defined as “temporal goods that are subject to the authority of the Church because they pertain to some moral or public juridic person.”¹⁷ These temporal goods can include *any* property—whether movable or immovable, corporeal or non-corporeal, sacred or profane.¹⁸ However, a public juridic person may not use its ecclesiastical goods for any purposes that go beyond the scope of the purposes stated in canon law, which includes divine worship, the decent support of the clergy and other ministers, and the exercise of works of the sacred apostolate and of charity.¹⁹

¹⁴ Historically, bankruptcy is associated with financial failure or with business ineptitude on the part of insolvent businesses. Solvent businesses were not perceived to have a need for bankruptcy protection because they could meet their financial obligations with their creditors. Under the current Bankruptcy Code, which was implemented in 1978, insolvency is no longer required. Rather, reorganization bankruptcy has evolved into more of a business strategy that allows corporations to remain intact while reorganizing their debts. Cf. M.J. WHITE, “Abuse or Protection? Economics of Bankruptcy Reform under BAPCPA,” in *University of Illinois Law Review*, 2007 (2007), 285.

¹⁵ Cf. K.J. DELANEY, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage*, Berkeley, CA, University of California Press, 1999, 161.

¹⁶ J.B. JARBOE, “Bankruptcy—The Last Resort: Protecting the Diocesan Client from Potential Liability Judgments,” in *Catholic Lawyer*, 37 (1996-1997), 155. Cf. P. FOOHEY, “When Churches Reorganize,” in *American Bankruptcy Institute Law Review*, 88 (2014), 277-306; David A. SKEEL, “When Should Bankruptcy Be an Option (for People, Places, or Things)?” in *William and Mary Law Review*, 55 (2014), 2238; C.M. DAVITT, “Whose Steeple Is It? Defining the Limits of the Debtor’s Estates in the Religious Bankruptcy Context,” in *Seton Hall Legislative Journal*, 29 (2005), 531; FORMICOLA, *Clerical Sexual Abuse: How the Crisis Changed U.S. Catholic Church–State Relations*, 138.

¹⁷ A.J. MAIDA, “Canon Law Implications of Real Estate Transactions – Impact on the New Canon Law. (Diocesan Attorneys: 17th Annual Meeting) (transcript),” in *Catholic Lawyer*, 27 (1982), 220.

¹⁸ R. SMITH, “Temporal Goods and Their Administration [cc. 634-640],” in J.P. BEAL, J.A. CORIDEN, and T.J. GREEN (eds.), *New Commentary on the Code of Canon Law*, New York, NY, Paulist Press, 2000, 799.

¹⁹ Cf. c. 1254.

1.1 — Stable Patrimony

When a public juridic person contemplates filing for reorganization bankruptcy, the canonical question revolves around which properties among the juridic person's holdings are at risk of alienation. While all ecclesiastical goods can be harmed in a Chapter 11 bankruptcy filing, it is those goods that fall under the category of stable patrimony that *Book V* of the *CIC/83* addresses.

All stable patrimony falls under the umbrella of ecclesiastical goods, but not all ecclesiastical goods are considered stable patrimony. The term *stable patrimony* appears in canons 1285 and 1291²⁰ and refers to a category of ecclesiastical goods belonging to the public juridic persons. Although it uses *patrimonium stabile* and assumes that all public juridic persons have stable patrimony, the Code does not define it.²¹

However, there is general agreement among commentators as to what this term intends. Accordingly, temporal goods designated as stable patrimony are intended to provide the juridic entity a sense of stability or security.²² In other words, stable patrimony is the minimum amount of assets that a public juridic person should have to exist and to carry out its intended purpose.²³ The following commentators provide perhaps some of the more succinct descriptions of the current understanding of stable patrimony. Mariano López Alarcon writes:

Stable patrimony is comprised of those goods that constitute the minimum secure financial basis to enable the juridical person to subsist autonomously

²⁰ It should be noted that, while canons 1285 and 1291 use the term *stable patrimony*, canons 638 §3 and 1295 use the term *patrimonial condition* instead. These two terms, however, appear to be synonymous. Cf. N.P. CAFARDI, "Alienation of Church Property," in K.E. MCKENNA, L.A. DiNARDO, and J.W. POKUSA (eds.), *Church Finance Handbook*, Washington, DC, Canon Law Society of America, 1999, 249. In the *CCEO*, canons 1026, 1029 and 1035 §3 use the term *stable patrimony*, while canon 1042 uses *patrimonial condition* instead; similar to the *CIC/83*, these two terms are also used synonymously in the *CCEO*. Interestingly, canon 122 of the *CIC/83* uses neither *stable patrimony* nor *patrimonial condition*; instead, it uses the term *patrimonial goods*. Cf. J.A. RENKEN, "Temporal Goods in the Latin and Eastern Codes: A Comparative Study," in *Studies in Church Law*, 5 (2009), 79-118. Additionally, the term stable patrimony did not appear in the *CIC/17*. This concept is an invention of the *CIC/83*. For a detailed study of the origin of this term, how it was used and applied, and how it became a fundamental part of the language of temporal goods in the Church in the *CIC/83*, see J.A. RENKEN, "The Stable Patrimony of Public Juridic Persons," in *The Jurist*, 70 (2010), 131-162.

²¹ CAFARDI, "Alienation of Church Property," 247.

²² V. DE PAOLIS, *De bonis Ecclesiae temporalibus: Adnotationes in Codicem, Liber V*, Rome, Pontificia Universitas Gregoriana, 1986, 100.

²³ RENKEN, "The Stable Patrimony of Public Juridic Persons," 32.

and to attend to the purposes and services proper to it; there are no absolute rules, however, for establishing the stability of a patrimony, since this depends not only on the nature and the quality of the goods, but also on the financial requirements for the fulfilling of the objectives, as well as on the stationary or expansive situation of the institution.²⁴

Nicolas Cafardi writes:

Stable patrimony is the inheritance of a public juridic person—the permanent goods (real estate and imperishable personalty) that the current administrators either have received from prior administrators or have accrued themselves. Such goods are to be used by them to benefit the public juridic person and are to be preserved by them for the future benefit of the public juridic person.²⁵

John Renken writes:

The purposes of a juridic person are “works of piety, of the apostolate, or of charity, whether spiritual or temporal” (c. 114 §2) which are in keeping with the mission of the Church and transcend the purpose of the individual persons or things (c. 114 §1). The law envisions not only that the aggregate has the capacity to possess patrimony, but that some of it would be “stable” patrimony. Stable patrimony provides the self-sufficient means to achieve the designated purpose of the juridic person, not just for a while but perpetually. It is a true category of ecclesiastical goods, distinct from non-stable patrimony.²⁶

Finally, Velasio De Paolis writes:

The concept of stable patrimony is a new notion introduced to answer the needs of our modern economy, which no longer rests prevalently on goods once defined as immovable. Jurisprudence needs to define the concept of stable patrimony further. One thing is certain: the new code presupposes that every juridical person has a stable patrimony which can be made up of either moveable or immoveable goods. The determination of these goods depends on the organs of the juridical person itself, in as much as a legitimate ascription is required for those goods to become a part of the stable patrimony. When we speak of legitimate ascription, we mean that such an ascription is done according to the norms of law and even according to particular law.²⁷

²⁴ M. LÓPEZ ALARCÓN, “Book V: Temporal Goods of the Church,” in E. CAPARROS and H. AUBÉ (eds.), *Code of Canon Law Annotated*, 2nd rev. ed., Montréal, Wilson and Lafleur, 2004, 993.

²⁵ CAFARDI, “Alienation of Church Property,” 249.

²⁶ RENKEN, “The Stable Patrimony of Public Juridic Persons,” 147. Cf. R.T. KENNEDY, “Book V: The Temporal Goods of the Church [cc. 1254-1310],” in J.P. BEAL, J.A. CORIDEN, and T.J. GREEN (eds.), *New Commentary on the Code of Canon Law*, New York, NY, Paulist Press, 2000, 1501-1503.

²⁷ V. DE PAOLIS, “Temporal Goods of the Church in the New Code with Particular Reference to Institutes of Consecrated Life,” in *The Jurist*, 43 (1983), 356.

De Paolis' point is particularly salient: a mere physical description of property alone is no longer sufficient. This is true especially in the economic system where the methods of measuring value have changed in recent years.²⁸ In addition to the descriptions of the physical attributes of temporal goods—that is, moveable or immovable—perhaps descriptive attributes of the purposes of the temporal goods can also be useful. For example, considering the modern economy referred to by De Paolis, the creation of trust funds could be a means by which a juridic person maintains its stable patrimony. Depending on how trust funds are created, their bylaws can be made to reflect the desire of canon law to protect the stable patrimony of the public juridic persons.

1.2 — Alienation of Stable Patrimony

When stable patrimony is to be alienated, canon 1291 of the *CIC/83* has specific regulations governing how the act of alienation is to be carried out. Commenting on the provision and the limitation of canon 1291, Joaquín Mantecón writes:

Not included in this provision are goods that, even though they may have a value greater than the amount established by law, are not a part of the [juridic] person's stable patrimony; this would be quite a rare case. Also not included are goods that belong to the stable patrimony but do not exceed the established sum.²⁹

Thus, permission from a competent ecclesiastical authority is needed for a valid alienation only when the stable patrimony being alienated exceeds the

²⁸ For example, until recently, gold was used as the standard to measure monetary value and its stability. By the early 1900s, however, most nations had adopted the method of measuring the health of their monetary systems based on the global value of gold. With the modernization and economic changes that took place after World War II, nations are developing new ways to measure their wealth and are looking for a new “gold-standard” that is not based on the value of gold. Cf. S. KNAFO, “The Gold Standard and the Origins of the Modern International Monetary System,” in *Review of International Political Economy*, 13 (2006), 78-102; F. BRADBURY, “The Dynamic Economy: The Case for a New Economic Order Based on Dynamics and Related to the Value of Energy,” in *International Journal of Environmental Studies*, 15 (1980), 287-292; Nathan LEWIS, “The 1870-1914 Gold Standard: The Most Perfect One Ever Created,” 3 January 2013, available at <http://www.forbes.com/sites/nathanlewis/2013/01/03/the-1870-1914-gold-standard-the-most-perfect-one-ever-created/> (last accessed 1 March 2017).

²⁹ J. MANTECÓN, “Title III: Contracts and Especially Alienation, cc. 1290-1298,” in Á. MARZO, J. MIRAS, and R. RODRIGUEZ-OCAÑA (eds.), *Exegetical Commentary on the Code of Canon Law*, 5 vols., Montréal, Wilson & Lafleur, 2004, vol. IV/1, 131.

limits established by law.³⁰ Consequently, no permission is required when alienating stable patrimony that has an economic value below the amount established by law. Also, since canon 1291 applies only to stable patrimony, regardless of the amount involved, permission is not required for validity when alienating ecclesiastical goods not designated as stable patrimony.

2 — *Care of Ecclesiastical Goods*

According to the Code, each public juridic person must have an administrator, whose responsibility is to manage the ecclesiastical goods and the stable patrimony on behalf of the juridic person.³¹ The Code compares this administrator to a *good steward of the household*.³² Canon 1279 stipulates that statutes of the public juridic person should identify the administrator and, if the statutes make no provision for this, then it is the role of the ordinary of the juridic person to appoint a suitable person. Once appointed, an administrator is to care for the public juridic person's ecclesiastical goods in ways that are consistent with the principal purposes articulated by universal law.³³

³⁰ However, the Code stipulates that, in any transaction that can worsen the stable patrimonial condition of the juridic person, the provisions of canons 1291-1294 are applicable. This will be discussed in subsequent sections. Concerning the maximum and minimum limits for the alienation of ecclesiastical goods, canon 1292 gives the conferences of bishops the authority to establish these parameters for their specific region. As of 1 December 2011, the USCCB decreed the following maximum and minimum limits for acts of alienation of stable patrimony for dioceses in the United States: The maximum limit for alienation and any transaction which, according to the norm of law, can worsen the patrimonial condition is \$7,500,000 for dioceses with Catholic populations of half a million persons or more; for other dioceses, the maximum limit is \$3,500,000. The minimum limit for alienation and any transaction which, according to the norm of law, can worsen the patrimonial condition is \$750,000 for dioceses with Catholic populations of half a million persons or more; and for other Dioceses, the minimum limit is \$250,000. For other public juridic persons subject to the Diocesan Bishop, the maximum limit for the alienation of property is \$3,500,000 while the minimum limit is \$25,000 or 10% of the prior year's ordinary annual income, whichever is greater. Cf. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Canon 1292 §1 – Minimum and Maximum Sums, Alienation of Church Property*, 1 December 2011, available at: <http://www.usccb.org/beliefs-and-teachings/what-we-believe/canon-law/complementary-norms/canon-1292-1-minimum-and-maximum-sums-alienation-of-church-property.cfm> (last accessed 1 April 2017).

³¹ Cf. G. NEDUNGATT, "Who Is the Administrator of Church Property? The Answer of the Ecumenical Councils," in *Folia Canonica*, 4 (2001), 117-133.

³² Cf. c. 1284.

³³ Z. COMBALIÁ, "Title II: The Administration of Goods, cc. 1273-1289," in Á. MARZOA, J. MIRAS, and R. RODRIGUEZ-OCAÑA (eds.), *Exegetical Commentary on the Code of Canon Law*, 5 vols., Montréal, Wilson & Lafleur, 2004, vol. IV/1, 100.

Canon 1284 mandates that administrators have the responsibility to “exercise vigilance so that the goods entrusted to their care are in no way lost or damaged, taking out insurance policies for this purpose insofar as necessary,” and to “take care that the ownership of ecclesiastical goods is protected by civilly valid methods.”³⁴ Recognizing that Catholic institutions in the United States exist in different civil jurisdictions, an administrator has some flexibility to utilize the various methods available in civil law to protect the ecclesiastical goods of the juridic entity. However, the appropriation of civil law methods is only possible if such methods are not contrary to divine law and unless canon law provides otherwise.³⁵

3 — *Retention of Temporal Goods*

The Catholic Church has an obligation to transmit the Good News as proclaimed by Jesus Christ. Such an obligation requires the Church to have access to and engage with the temporal world. Essentially, having possession of or access to temporal goods allows the Church to live outwardly and socially—through its structure, through its members—and to provide adequate care for its members so they can develop potentialities and to thrive—as institutions and as persons.³⁶

3.1 — *Retinere*

Canon 1254 uses the term *retinere*,³⁷ the active infinitive form of *retineō*. Translated into English, *retinere* means *to restrain, to hold back, or to retain*.³⁸ *Black’s Law Dictionary* defines retain as “to hold in possession or under control; to keep and not lose, part with, or dismiss.”³⁹ Adolf Berger’s *Encyclopedic*

³⁴ Can. 1284: “§1. All administrators are bound to fulfill their function with the diligence of a good householder. §2. Consequently, they must: 1° exercise vigilance so that the goods entrusted to their care are in no way lost or damaged, taking out insurance policies for this purpose insofar as necessary; 2° take care that the ownership of ecclesiastical goods is protected by civilly valid methods; [...]”

³⁵ Cf. c. 22; T.E. MOLLOY, “The Canonization of Civil Law: The Law on Labor Relations,” in *CLSA Proceedings*, 46 (1984), 43-45.

³⁶ CORIDEN, *The Parish in Catholic Tradition: History, Theology, and Canon Law*, 39.

³⁷ Can. 1254 §1: “Ecclesia catholica bona temporalia iure nativo, independenter a civili potestate, acquirere, retinere, administrare et alienare valet ad fines sibi proprios proseguendos.”

³⁸ L.F. STELTEN (ed.), *Dictionary of Ecclesiastical Latin*, Peabody, MA, Hendrickson Publishers, 2007, 231.

³⁹ *Black’s Law Dictionary*, 1509.

Dictionary of Roman Law provides a more extensive definition: “the retaining of a thing by a person who normally is obligated to return it to its owner. This kind of self-help could occur in various situations, especially when a person had to bear expenses on another’s thing which he was temporarily holding.”⁴⁰ Berger’s definition distinguishes between retention and ownership; this seems to be closer to how canon law understands *retinere*. As St. Thomas Aquinas contended, since God has *dominium* over all created things, the right to retain property is nothing more than “a power of stewardship over what belongs to God, who intends material goods to be for the benefit of all men.”⁴¹ Following this logic, public juridic persons retain or possess ecclesiastical goods, not for their own benefit, but for the benefit of others.

3.2 — Act of Retention

An administrator of ecclesiastical goods is to act as diligently as a *good householder*,⁴² which includes taking proper actions to enable the public juridic person to retain its ecclesiastical goods. The Code does not provide specific guidelines regarding how a public juridic person is to retain ecclesiastical goods. Perhaps the Code viewed it as unnecessary, because the retention of any ecclesiastical goods by institutions in the Church must always be consistent with the Church’s mission.⁴³ In other words, how a juridic person retains its ecclesiastical goods is implied in how it is to acquire, administer or alienate such goods: by any just means⁴⁴ available under natural and positive law.⁴⁵ Thus, there is no need to address the issue of retention. Commenting on this, Mariano López Alarcón writes:

The objectives, public function, and social and economic principles ... converge in an economic system of mediations, befitting ecclesial patrimony, where goods—goods acquired and preserved as well as profit-producing

⁴⁰ A. BERGER (ed.), *Encyclopedic Dictionary of Roman Law*, Philadelphia, PA, American Philosophical Society, 1953, 683.

⁴¹ D. MACLAREN, *Private Property and Natural Law, Aquinas Papers No. 8*, Oxford, Blackfriars, 1948 at 15.

⁴² Cf. c. 1284.

⁴³ One could argue that by creating the category of stable patrimony, the Code intends to help the public juridic persons retain temporal goods. At the very least, by making it difficult to alienate stable patrimony, the Code wants to protect certain ecclesiastical goods from being invalidly alienated. Cf. J. GONZÁLEZ, “Alienation of Church Goods: Why and How?” in *Boletín Eclesiástico de Filipinas*, 8 (2005), 426-435.

⁴⁴ Can. 1259: “Ecclesia acquirere bona temporalia potest omnibus iustis modis iuris sive naturalis sive positivi, quibus aliis licet.”

⁴⁵ Cf. J.C. PÉRISSET, *Les biens temporels de l’Église: Commentaire des canons ‘1254-1310’*, Paris, Tardy, 1996, 68-71.

goods—should not be accumulated unless they constitute stable patrimony. Instead, they should be used according to their proper destination. Prevailing in this system are gratuitous juridical acts and the broad social function of property, all ordained to serving the Church's and men's needs, especially the needs of the poorest.... Public juridical persons, being required to act in the name of the Church, are obliged to operate in a strictly licit manner when acquiring, using, and trading in goods. They must refuse possession or use of goods that, depending on the circumstances, may cloud the Church's clear image, whether because of their nature or their volume.... The repugnance once felt for business activities of ecclesial or filial entities that benefit their own objectives must be overcome.⁴⁶

While a public juridic person is not encouraged to accumulate profits or wealth, the canons concerning stable patrimony and the need to protect it can be interpreted as relating to acts of retention. In fact, the idea of declaring some ecclesiastical goods as stable patrimony is itself an act to foster the retention and protection of such goods.⁴⁷ Understood in this way, acts associated with the retention of ecclesiastical goods or goods classified as stable patrimony can be understood in the negative—that is, by identifying what cannot be done to a specific category of goods. For example, canon 1293 asserts that, prior to the alienation of certain goods, there must be a demonstration of just cause (i.e., urgent necessity, evident advantage, piety, charity or some other grave pastoral reason), a written appraisal from an expert of the goods involved, etc. Canon 1294 prohibits the alienation of any assets for less than what was appraised. Moreover, one can argue that the purpose of canon 1295 is to help protect “ecclesiastical goods which one wishes to retain as stable patrimony.”⁴⁸

4 — *Acts of Administration Concerning Ecclesiastical Goods*

The Code distinguishes three kinds of acts of administration pertaining to the ecclesiastical goods of public juridic persons. Two are applicable universally: *acts of ordinary administration* and *acts of extraordinary administration*. The third applies only to dioceses and is referred to as *acts of administration which are more important in light of the economic condition of the diocese*.

⁴⁶ M. LÓPEZ ALARCÓN, “Introduction, cc. 1254-1258,” in Á. MARZOA, J. MIRAS, and R. RODRIGUEZ-OCAÑA (eds.), *Exegetical Commentary on the Code of Canon Law*, 5 vols., Montréal, Wilson & Lafleur, 2004, vol. IV/1, 15.

⁴⁷ RENKEN, “The Stable Patrimony of Public Juridic Persons,” 155.

⁴⁸ J.A. RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, Staten Island, NY, St. Pauls, 2009, 282.

4.1 — Acts of Ordinary Administration

Acts of ordinary administration are the activities performed on a routine basis for the basic maintenance of any public juridic person, including the paying of utility bills, ensuring the regular and routine maintenance of buildings, balancing financial records, paying of employee salaries, contributing to employee's pension funds and health insurance, etc.⁴⁹ Administrators who carry out acts of ordinary administration do not need permission⁵⁰ from a higher ecclesiastical authority before placing such acts.⁵¹ In some circumstances and if not contrary to universal law, administrators of ecclesiastical goods may delegate acts of ordinary administration to others.

Since the Code does not provide explicit criteria for acts of ordinary administration, John Myers suggests that these acts could be determined implicitly by using curial decrees and past practices.⁵² For example, on July 21, 1956, the Sacred Congregation of Propaganda approved a list of acts that were *not considered* acts of ordinary administration for a diocese in the Netherlands. These acts included the buying of property, the accepting/rejecting of inheritance or donations, and the buying/selling of sacred art and items that possess important historical or religious significance.⁵³ From such a list, Myers contends that administrators of ecclesiastical goods can compare various acts of administration: if a proposed act does not rise to the level of importance of those acts on the list, then, by implication, such an act is to be considered an act of ordinary administration.⁵⁴

Zoila Combalía recommends a similar approach. Noting that the Code compares an administrator of temporal goods of the juridic person to a *good*

⁴⁹ RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish*, 117.

⁵⁰ For a detailed analysis of the terms *faculty*, *licentia*, and *permission* and how they relate to the power of governance, see J.M. HUELS, "Permissions, Authorizations and Faculties in Canon Law," in *Studia canonica*, 36 (2002), 25-58. For the scope of this work, the term *faculty* is aptly defined as "an ecclesiastical power or authorization necessary for performing lawfully an act of ministry or administration in the name of the Church." *Ibid.*, 29. *Licentia*, used in canon law to mean *permission*, is defined as "an authorization or permission that enables a person lawfully to perform an act either in the name of the Church or in one's own name." *Ibid.*, 44.

⁵¹ F.G. MORRISSEY, "Ordinary and Extraordinary Administration: Canon 1277," in *The Jurist*, 48 (1988), 716.

⁵² Cf. J.J. MYERS, "Book V: The Temporal Goods of the Church (cc. 1254-1310)," in J.A. CORIDEN, T.J. GREEN, and D.E. HEINTSCHEL (eds.), *The Code of Canon Law: A Text and Commentary*, New York, NY, Paulist Press, 1985, 874.

⁵³ Cf. W.J. DOHENY, *Practical Problems in Church Finance: A Study of the Alienation of Church Resources and of the Canonical Restrictions on Church Debt*, Milwaukee, WI, Bruce Pub. Co., 1941, 26.

⁵⁴ Cf. MYERS, "Book V: The Temporal Goods of the Church (cc. 1254-1310)," 874.

householder,⁵⁵ Combalía proposes that one can know the fundamental characteristics of acts of ordinary administration by looking at the Code's treatment of acts of extraordinary administration.

By giving a general description of the obligations and duties of the administrator, this canon may serve as a guideline to determine the scope of 'the purpose and methods of ordinary administration' and, therefore, to clarify what must be understood by extraordinary administration.⁵⁶

Regardless of the criteria employed to determine acts of ordinary administration, these criteria should be flexible, depending on place, time, objectives, and customary practices already in place. Francis Morrissey notes that, since jurisdictions can vary, criteria used to determine acts of ordinary administration should take into consideration those unique and diverse circumstances. In a North American context, for example, Morrissey suggests that acts of ordinary administration should most likely include the collection and the banking of money acquired in approved ways; the collection of debts from creditors; the collection of annual income from stocks, shares, or bonds; the buying and selling of what is required for daily maintenance; the repairing of damage done to real estate; the administration of money and goods belonging to the juridic person; the acceptance of donations; and acts involving certain minor leases.⁵⁷

According to canon 1279 §1, unless particular law or statutes determine otherwise, administrators who immediately govern juridic persons have the authority to carry out acts of ordinary administration. By implication, valid acts of ordinary administration are those placed by persons who have been lawfully appointed as administrators of ecclesiastical goods, in accord with the relevant provisions of civil and ecclesiastical law.

Acts of ordinary administration of parish property can include a wide range of activities, including activities such as paying salaries to parish staff, hiring a company to make basic repairs of the parish church, hiring a youth coordinator or music coordinator, paying utility bills, paying property taxes, etc. Furthermore, one may argue that acts of ordinary administration also include acts that relate the parish to the diocese, including the filing of monthly and annual reports to the diocesan curia, the paying of routine diocesan taxes, etc. These are all acts of administration of ecclesiastical goods for which pastors do not need permission from a higher ecclesiastical authority.⁵⁸

⁵⁵ Cf. c. 1284.

⁵⁶ COMBALÍA, "Title II: The Administration of Goods, cc. 1273-1289," 114.

⁵⁷ MORRISSEY, "Ordinary and Extraordinary Administration: Canon 1277," 711.

⁵⁸ RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish*, 118.

4.2 — Acts of Extraordinary Administration

Acts that go beyond the manner and scope of acts of ordinary administration are called acts of extraordinary administration because, by their nature, they exceed what would be constituted as routine acts of ordinary administration required for the basic maintenance of a juridic person.⁵⁹ These acts are determined by universal law, particular law or proper law. While the Code does refer to acts of extraordinary administration (or acts that exceed the limit/manner of ordinary administration),⁶⁰ it does not define them.⁶¹

However, among commentators, there is agreement regarding the general nature of acts of extraordinary administration. For example, Robert Kennedy holds that acts of extraordinary administration are those acts which occur irregularly or whose financial consequences are considerable.⁶² Recognizing that the Code prefers a qualitative approach to a quantitative approach when determining what constitutes acts of extraordinary administration,⁶³ Jordan Hite remarks that acts of extraordinary administration are “those which because of the nature or importance of the action or its financial value require the permission of a higher authority.”⁶⁴ Summarizing the meaning of acts of extraordinary administration in the *CIC/83*, John Renken writes:

Concerning *all* acts of extraordinary administration (i.e., whether they are established *iure universali* or *iure particulari*): (1) Acts of extraordinary administration are understood to be those acts of administration which exceed the limits and manner of ordinary administration. (2) Acts of extraordinary administration are performed by the administrator of the juridic person. (3) The administrator needs the consent of one or more other physical persons, whether as individuals or as members of group, in order to perform acts of extraordinary administration.⁶⁵

⁵⁹ COMBALIÁ, “Title II: The Administration of Goods, cc. 1273-1289,” 105.

⁶⁰ Cf. cc. 1277 and 1281.

⁶¹ Renken proposes the following as acts of extraordinary administration: to refuse gifts of greater importance (c. 1267 §2); to invest surplus funds (c. 1284 §2); to initiate or contest civil litigation (c. 1288); to enter some threatening contracts (c. 1295); to lease ecclesiastical goods (c. 1297); to invest goods in an endowment (c. 1305); and to erect a new church building (c. 1215). Cf. J.A. RENKEN, “Acts of Extraordinary Administration of Ecclesiastical Goods in *Book V* of the *CIC*,” in *Studia canonica*, 49 (2015), 593-595.

⁶² KENNEDY, “Book V: The Temporal Goods of the Church [cc. 1254-1310],” 1470.

⁶³ J.L. SANTOS DIEZ, “La administración extraordinaria de los bienes eclesiásticos,” in J. SÁNCHEZ Y SÁNCHEZ (ed.), *El derecho patrimonial canónico en España: XIX Semana Española de derecho canónico, celebrada en Salamanca del 17 al 21 de septiembre de 1984*, Salamanca, Universidad Pontificia de Salamanca, 1985, 44.

⁶⁴ Cf. J.F. HITE, “Church Law on Property and Contracts,” in *The Jurist*, 44 (1984), 121.

⁶⁵ RENKEN, “Acts of Extraordinary Administration of Ecclesiastical Goods in *Book V* of the *CIC*,” 590.

Additionally, to further distinguish acts of extraordinary administration from acts of ordinary administration, Combalía notes that administrators should ask several questions. How much in assets would be diminished by the act? How serious is the risk of financial loss? What is the potential danger to the actual stable patrimony? How complex is the nature of the act of administration? What is the duration of the terms of the execution of the act—especially if it involves loans or leases for which the juridic person may have to be accountable?⁶⁶

Because of their nature or importance, the Code identifies how acts of extraordinary administration are to be determined. For dioceses, the conference of bishops is responsible for defining acts of extraordinary administration.⁶⁷ For religious institutes, their proper law determines acts of extraordinary administration.⁶⁸ For other public juridic persons subject to the diocesan bishop,⁶⁹ their statutes determine acts of extraordinary administration, but if the statutes are silent, the diocesan bishop is competent to define these acts.⁷⁰

4.3 — Acts of Ordinary Administration Which Are More Important in Light of the Economic Condition of the Diocese

Canon 1277 defines acts of ordinary administration *which are more important in light of the economic condition of the diocese*.⁷¹ These are acts

⁶⁶ COMBALÍA, “Title II: The Administration of Goods, cc. 1273-1289,” 105.

⁶⁷ Cf. c. 1277; UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, “Canon 1277 – Acts of Extraordinary Administration by Diocesan Bishops,” available at: <http://www.usccb.org/beliefs-and-teachings/what-we-believe/canon-law/complementary-norms/canon-1277-acts-of-extraordinary-administration-by-diocesan-bishop.cfm> (last accessed 27 March 2017). It is worth noting that the original *Canon 1277 – Acts of Extraordinary Administration by Diocesan Bishop* sent to the Congregation of Bishops for a *recognitio* included a fifth item: the filing for Chapter 11 bankruptcy protection. Cf. RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 183-184. However, when the USCCB promulgated *Canon 1277 – Acts of Extraordinary Administration by Diocesan Bishop* in 2010 with the *recognitio* from the Congregation for Bishops, the act of filing for Chapter 11 was not included, and no explanation was given.

⁶⁸ Cf. c. 638 §1; R.M. McDERMOTT, “Governance in Religious Institutions: Structures of Participation and Representation, Canons 631–633,” in *The Jurist*, 69 (2009), 447; A.J. MAIDA and N.P. CAFARDI, *Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook*, St. Louis, MO, Catholic Health Association of the United States, 1984, 43; SMITH, “Temporal Goods and Their Administration [cc. 634-640],” 802.

⁶⁹ Such public juridic persons typically include parishes, diocesan hospitals, schools, seminaries, retreat centers, social service agencies, etc. RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 201.

⁷⁰ *Ibid.*, 180. Cf. KENNEDY, “Book V: The Temporal Goods of the Church [cc. 1254-1310],” 1483.

⁷¹ Can. 1277 reads: “Episcopus dioecesanus quod attinet ad actus administrationis ponendos, qui, attento statu oeconomico dioecesis, sunt maioris momenti, consilium a rebus oeconomicis

of ordinary administration that are considered potentially weightier than those acts generally associated with the routine maintenance of a diocese. Since these acts pertain only to the juridic person that is the diocese,⁷² the only person who can perform them is the diocesan bishop; without delegation, no one else may validly carry out these acts on his behalf.⁷³

The Code does not define acts of ordinary administration which are more important in light of the economic condition of the diocese.⁷⁴ However, commentators have offered their reflections about these acts. For example, Combalía notes that, while these should belong in the category of acts of ordinary administration, they tend to be risky in nature.⁷⁵ Federico Aznar Gil suggests that such risky transactions could potentially be detrimental to the stable patrimonial condition of the juridic person and ought not to be considered mere acts of ordinary administration.⁷⁶

Canon 1277 relegates the responsibility for determining acts of ordinary administration which are more important in light of the economic condition of the diocese to the diocesan bishop. Thomas Paprocki notes that the bishop should make this determination in a prudent manner; he opines that the diocesan bishop should consult with the finance council, the college of consultors, and perhaps other parties with a stake in the matter.⁷⁷

et collegium consultorum audire debet; eiusdem tamen consilii atque etiam collegii consultorum consensu eget, praeterquam in casibus iure universali vel tabulis foundationis specialiter expressis, ad ponendos actus extraordinariae administrationis. Conferentiae autem Episcoporum est definire quinam actus habendi sint extraordinariae administrationis." The *CCEO*'s equivalent to canon 1277 of the *CIC/83* is canon 263 §4: "The eparchial bishop, in the more important acts concerning financial matters, is not to fail to hear the financial council. The members of this council have only a consultative vote, unless their consent is required by common law in cases specifically mentioned or by the founding document."

⁷² Other public juridic persons (i.e., religious institutes) are not covered under canon 1277. However, as Renken notes, "nothing prevents particular [laws of these religious institutions] from making such determinations." RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 179.

⁷³ *Ibid.*, 178.

⁷⁴ *CIC/17* did refer to "acts of major importance" and it can be argued that such acts are the same ones referred to by canon 1277 as acts of ordinary administration which are more important in light of the economic condition of the diocese. However, the *CIC/17* provided no parameters to establish what constituted these acts of major importance. Cf. MORRISEY, "Ordinary and Extraordinary Administration: Canon 1277," 716.

⁷⁵ COMBALÍA, "Title II: The Administration of Goods, cc. 1273-1289," 97.

⁷⁶ F.R. AZNAR GIL, *La administración de los bienes temporales de la Iglesia: Legislación universal y particular española*, Salamanca, Universidad Pontificia de Salamanca, 1984, 383.

⁷⁷ T.J. PAPROCKI, "Recent Developments Concerning Temporal Goods, Including Complementary USCCB Norms," in *CLSA Proceedings*, 70 (2008), 281. One commentator notes that perhaps one of the main reasons why the Code gives the diocesan bishop competency to

5 — Religious Institutes and Proper Law

The Code presumes that all religious institutes that are public juridic persons have statutes. Statutes are defined in canon 94 §1 as “ordinances which are established according to the norm of law in aggregates of persons (*universitates personarum*) or of things (*universitates rerum*) and which define their purpose, constitution, government, and methods of operation.” For religious institutes, their statutes form the basis of their proper law (*ius proprium*),⁷⁸ and one of the clearest places in the Code where proper law plays a prominent role in the lives of religious institutes is in the care of ecclesiastical goods. According to canon 635, the care of ecclesiastical goods that belong to religious institutes is governed by both universal law and their own proper law.⁷⁹

The proper law of a religious institute includes its constitutions, statutes, and directories. Among these is its fundamental code representing its proper law.⁸⁰ It is in its constitution that the primary purpose or mission of the institute is articulated.⁸¹ As the principal internal legislative text, an institute’s constitution expresses not only its spiritual patrimony, but also provides

determine these acts because he is in the best position to determine what warrants being considered as *more important in light of the economic condition of his diocese*. MYERS, “Book V: The Temporal Goods of the Church (cc. 1254-1310),” 873. Cf. C.J. RITTY, “Changing Economy and the New Code of Canon Law,” in *Catholic Lawyer*, 12 (1966), 342.

⁷⁸ J.A. CORIDEN, *An Introduction to Canon Law*, Mahwah, NJ, Paulist Press, 1991, 161. Consequently, the proper law of religious institutes “applies the Church’s general law to a particular institute, expressing its charism, its spirit, and the intent of the founder.” SMITH, “Temporal Goods and Their Administration [cc. 634-640],” 780. It is important to understand that proper law is distinct from particular law. Particular law is the body of law made by a conference of bishops that is applicable to entities located within that conference, or by a diocesan bishop that is applicable only to entities within his diocese—e.g., a particular law regarding the care of temporal goods applies only in the geographic territory that is the episcopal conference or the diocese and is not enforceable outside. Cf. J.A. RENKEN, “Particular Laws on Temporal Goods,” in *Studies in Church Law*, 4 (2008), 447-454; E. GAMBARI, *Religious Life According to Vatican II and the New Code of Canon Law*, Boston, MA, the Daughters of St. Paul, 1986, 75-77, 82-84.

⁷⁹ J.F. HITE, “The Temporal Goods of Religious Institutes,” in K.E. MCKENNA, L.A. DINARDO, and J.W. POKUSA (eds.), *Church Finance Handbook*, Washington, DC, Canon Law Society of America, 1999, 45. Cf. canon 425 of the *CCEO*, which parallels canon 635 of the *CIC/83*. While canon 638 addresses only religious institutes, other canons address the care of ecclesiastical goods for secular institutes and societies of apostolic life. For secular institutes, the relevant canon is canon 718; for societies of apostolic life, the relevant canons are 734 and 741.

⁸⁰ MAIDA and CAFARDI, *Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook*, 43. Cf. c. 587.

⁸¹ In response to the Second Vatican Council, Pope Paul VI issued guidelines for the revision of the constitutions for religious institutes. For more details regarding the guidelines, see PAUL VI, apostolic letter *Ecclesiae Sanctae*, 6 August 1966, in *AAS*, 58 (1966), 757-758.

its juridic orientation.⁸² Apart from the constitution, however, there are other documents that comprise the proper law of a religious institute. These include the institute's statutes, complementary norms, directories, and other similar documents.⁸³ Once an institute's proper law has been approved by the competent ecclesiastical authority, the Church not only guarantees that the religious institute has a right to exist with a certain autonomy as it was founded, but the Church also requires local ordinaries to preserve and safeguard this autonomy.⁸⁴ Furthermore, any changes in an institute's approved constitution must have the consent of the competent ecclesiastical authority.⁸⁵

Norms pertaining to the care of goods can usually be found in directories rather than in the constitution of a religious institute. As Francis Morrissey points out, nowhere in canon law does it explicitly "state that [norms pertaining to the care of temporal goods] must be [included] in the constitutions. Rather, the most common form is for an institute to have a directory for the administration of temporal goods."⁸⁶ While an institute's constitution may refer briefly to ecclesiastical goods, a directory of temporal affairs may provide detailed norms about how ecclesiastical goods can be acquired, retained,

⁸² J. SUNDARA RAJ, *The Juridical Nature of the Religious Constitutions in the New Law System of the Church*, JCD diss., Rome, Pontificia Universitas Lateranensis, 1991, 37.

⁸³ Cf. F.G. MORRISSEY, "The Directory for the Administration of Temporal Goods in Religious Institutes," in L. GERMAIN, M. THÉRIAULT, and J. THORN (eds.), *Unico Ecclesiae servitio: Canonical Studies Presented to Germain Lesage, O.M.I., on the Occasion of his 75th Birthday and the 50th Anniversary of his Presbyteral Ordination*, Ottawa, ON, Saint Paul University, 1991, 269-271. It should be noted that canon 94 of the *CIC/83* also addresses statutes; however, the category of statutes referred to in canon 94 is more of a generic category which may include constitutions of religious institutes.

⁸⁴ MCDERMOTT, "Governance in Religious Institutions: Structures of Participation and Representation, Canons 631-633," 447. Cf. *Mutuae Relationes*, n. 13(c); c. 586 §2.

⁸⁵ M.A. O'REILLY, "The Proper Law of Institutes of Religious Life and of Societies of Apostolic Life," in L. GERMAIN, M. THÉRIAULT, and J. THORN (eds.), *Unico Ecclesiae servitio: Canonical Studies Presented to Germain Lesage, O.M.I., on the Occasion of his 75th Birthday and the 50th Anniversary of his Presbyteral Ordination*, Ottawa, ON, Saint Paul University, 1991, 300. Cf. c. 587 §2. As a recent example, the Legion of Christ (Legionaries) recently went through a major overhaul of its constitution, subsequent to an apostolic visitation initiated by the Holy See that ended in 2010. The change or rewriting process involved many legal experts from both inside the Legion as well as from outside, and took over four years to complete. The Legionaries' revised constitution was approved by the Congregation for the Institutes of Consecrated Life and Societies of Apostolic Life in November of 2014, available at: http://www.legrc.org/regnum_db/archivosWord_db/Decretoriginaelitaliano.pdf (last accessed 1 March 2017).

⁸⁶ F.G. MORRISSEY, "Temporal Goods and Their Administration, cc. 634-640," in Á. MARZO, J. MIRAS, and R. RODRIGUEZ-OCAÑA (eds.), *Exegetical Commentary on the Code of Canon Law*, 5 vols., Montréal, Wilson & Lafleur, 2004, Vol. II/2, 1676. Cf. c. 634.

administered, or alienated.⁸⁷ When a religious institute has a province spreading over multiple civil jurisdictions, it may be helpful for that province to have multiple directories to address the unique situations found in different civil jurisdictions.⁸⁸ However, whether everything is addressed in a single constitution or is spread out through a series of directories, what is important is that there exist some norms in the institute's proper law to address the care of ecclesiastical goods.

6 — Canon 1295

Since the stable patrimony of a public juridic person constitutes “the minimum secure financial basis to enable the juridical person to subsist autonomously and to attend to the purposes and services proper to it,”⁸⁹ a public juridic person must safeguard its stable patrimony. Nonetheless, an administrator of ecclesiastical goods could very well engage in transactions which could worsen the patrimonial condition of the public juridic person. Thus, canon 1295 requires that certain precautions be taken to safeguard the stable patrimony of the public juridic person in such circumstances.

6.1 — Requirements of Canon 1295

According to canon 1295, the requirements of canons 1291 through 1294 “must be observed not only in alienation but also in any transaction⁹⁰ which

⁸⁷ McDERMOTT, “Governance in Religious Institutions: Structures of Participation and Representation, Canons 631–633,” 459.

⁸⁸ Cf. “Section IV: Economic Administration”, in *The Constitutions of the Nuns of the Order of Preachers*, (1987 edition), available at: http://www.op.org/sites/www.op.org/files/public/documents/fichier/nuns_constitutions_020311.pdf (last accessed 1 April 2017); “Chapter V: The Administration of Temporal Goods”, in *The Constitutions and Practical Rules of the Congregation of Jesus and Mary* (1984 edition in French), available at: <http://www.eudistes.org/ConstAng.-copie.pdf> (last accessed 1 April 2017).

⁸⁹ LÓPEZ ALARCÓN, “Book V: Temporal Goods of the Church,” 993.

⁹⁰ While canon 1295 uses the term *transactions*, its precursor—canon 1533 of the *CIC/17*—used the term *contracts* instead. It is important to note that even in the *CIC/17*, however, the term *contract* was used broadly to refer to a variety of financial transactions to include not only bilateral transactions, but also unilateral transactions involving the transfer of rights and obligations as well. Cf. G. VROMANT, *De bonis Ecclesiae temporalibus ad usum utriusque cleri, praesertim missionariorum*, Vol. 6, Louvain, Museum Lessianum, 1934, 316-317. In the *CIC/83*, canon 1295 picks up this same theme but uses the term *transaction* instead of *contract* to dispel any confusion concerning what types of transactions fall under canon 1295. However, in the spirit of the *CIC/17*, the notion of contract is not lost in the

could worsen the patrimonial condition⁹¹ of a juridic person.⁹² Suitably, any transactions which could have a negative impact on the stable patrimony of a public juridic person must follow the requirements articulated in canons 1291 to 1294. As such, it is important to consider the scope and expectations of canon 1295.

Canon 1295 pertains only to goods designated as stable patrimony.⁹³ Consequently, ecclesiastical goods that have not been designated as stable patrimony do not fall under the scope of this canon. Moreover, canon 1295 applies only to transactions involving stable patrimony whose amounts exceed the minimum limit as established by the conference of

CIC/83; in fact, “Title III” of *Book V* of the *CIC/83*—which includes canons 1290 to 1298—is entitled “Contracts and Especially Alienation.” In his commentary on canon 1295, Renken refers to canon 1295 transactions as *threatening contracts*: “First, canon 1295 concerns contracts. Canon 1290, the first canon of ‘Title III,’ makes it clear that the remaining canons in the same title concern three distinct kinds of contracts: that is, those involving alienation ([canons] 1291-1294; 1296, 1298), threatening transactions which are not alienation ([canon] 1295), and leases ([canons] 1297-1298).” J.A. RENKEN, “Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295,” in *Studia canonica*, 45 (2011), 506. To learn more about how the term *contracts* was used in the *CIC/17*, see J.L. JUNG, *Transactions Which May Worsen the Patrimonial Condition of a Public Juridic Person in the United States: A Study of Canon 1295*, CLS no. 553, Washington, DC, The Catholic University of America, 1997, 126-134.

⁹¹ This canon uses the term *patrimonial condition* instead of *stable patrimony*, but these two terms have the same meaning in *Book V*. R. Kennedy writes: “From the canonical point of view, economic well-being is rooted in stable patrimony, namely, in all property destined to remain in the possession of its owner for a long or indefinite period of time and, hence, property on which the financial future of a public juridic person depends. That is the meaning of ‘patrimonial condition’ referred to in canon 1295.” KENNEDY, “Book V: The Temporal Goods of the Church [cc. 1254-1310],” 1502.

⁹² Canon 1295 uses the term *juridic person* without distinguishing whether this refers to a public juridic person or a private juridic person. Merely using the term *juridic person* can lead to speculation as to whether transactions of private juridic persons fall under this canon. It should be clear, however, that canon 1295 pertains exclusively to the public juridic persons. Kennedy writes: “There is nothing in the wording of canon 1295 that either explicitly or implicitly expresses an intention to include private juridic persons within its scope. Moreover, canon 1291 makes clear that the norms governing alienation found in canons 1291-1294 apply only to the stable patrimony of public juridic persons, and it is the chief purpose of canon 1295 to apply canons 1291-1294 to transactions other than alienation. That would seem to make clear that canon 1295 is similarly limited to public juridic persons. It is also noteworthy that the modifier ‘public,’ absent in canon 1295, is also absent in canons 1292-1294, though there can be no doubt that those canons, forming a cluster with canon 1291, apply only to public juridic persons. Canon 1295, explicitly referring to canons 1291-1294, seems clearly to be part of the same cluster.” *Ibid.*, 1502.

⁹³ Cf. c. 1291.

bishops.⁹⁴ Thus, transactions that do not exceed the minimum limit established by the conference of bishops are outside the scope of canon 1295. However, for all transactions that exceed the minimum amount established by the conference of bishops, canon 1295 requires that written permission from the competent ecclesiastical authority be obtained prior to placing them.⁹⁵

The competent authority to grant the necessary permission to place transactions which can worsen the patrimonial condition of a public juridic person will depend on the public juridic person which is seeking such permission. For example, if the public juridic person is a diocese or an institution that is subject to the diocesan bishop, the competent authority to grant the necessary permission would be the diocesan bishop. However, before he can grant such permission, the diocesan bishop must have the consent of the diocesan financial council and the college of consultors—along with any interested party who may be affected by the transaction if the situation demands it.⁹⁶ If the public juridic person is an institution not subject to the diocesan bishop, the competent authority to grant the permission is whoever is designated by the institution's statutes.⁹⁷ Comparably, if the public juridic person is a religious institute, the competent authority is designated in the institute's proper law.⁹⁸ Moreover, for all of these juridic entities (i.e., a diocese, an institution subject to the diocesan bishop, an institution not subject to the diocesan bishop, or a religious institute), if the transaction exceeds the maximum limit

⁹⁴ JUNG, *Transactions Which May Worsen the Patrimonial Condition of a Public Juridic Person in the United States: A Study of Canon 1295*, 88. Cf. c. 1292 §1. For religious institutes, the requirements necessary to place transactions which can worsen the patrimonial condition of the juridic person should be addressed in their proper law, which should be in conformity with the requirements stipulated by universal law (i.e., canons 1291 through 1294). Cf. RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 281.

⁹⁵ J.M. HUELS, *The Pastoral Companion: A Canon Law Handbook for Catholic Ministry*, 5th ed., Montréal, Wilson & Lafleur Ltée, 2016, 416. Cf. KENNEDY, "Book V: The Temporal Goods of the Church [cc. 1254-1310]," 1505; c. 1291.

⁹⁶ Cf. c. 1292 §1.

⁹⁷ Ibid.

⁹⁸ The proper law of a religious institute should include provisions concerning the spending limits. Generally, these limits mirror those set by the conference of bishops. Moreover, the proper law of a religious institute may also require that the superior who has the authority to grant permission to an administrator to place a transaction which may worsen the patrimonial condition of the public juridic person to have first the consent of his or her council before granting such permission. Cf. c. 638 §3; *Statutes on Religious Poverty in the Society of Jesus & Instruction on the Administration of Goods*, Rome, General Curia of the Society of Jesus, 2005, 47; J.B. BLANGIARDI, *The General Congregation as an Instrument of Governance in the Society of Jesus*, Ottawa, Saint Paul University, 1997, 119-121.

determined by the conference of bishops, then permission from the Holy See also (*insuper*) must be sought before an administrator of ecclesiastical goods can place such a transaction.⁹⁹

Apart from the nature of ecclesiastical goods involved (i.e., stable patrimony or not) and the limits on the amounts, the Code provides additional requirements that must be met before permission can be granted for transactions which can worsen the patrimonial condition of the public juridic person. For example, if a transaction involves divisible assets, canon 1292 §3 requires that all pertinent information surrounding those assets be disclosed before permission to alienate can be granted. Canon 1292 §4 stipulates that those who have the authority to give consent or counsel should be thoroughly informed of the economic status or condition of the public juridic person—including any relevant financial history that may affect the proposed transaction—before permission can be granted. Canon 1293 §1, 1° only permits transactions which can worsen the patrimonial condition of the public juridic person whose value exceeds the defined minimum amount in situations where there is a *just cause, urgent necessity, evident advantage, piety, charity, or other grave pastoral reasons*. Finally, to avoid harm to the Church and as a matter of policy, canon 1293 §2, 2° requires that there be written appraisals of assets by at least two experts, and canon 1294 §1 stipulates that the appraised price of the assets should be the price sought.¹⁰⁰

The Code's requirements for placing valid transactions which could worsen the patrimonial condition of a public juridic person are both exact and stringent. While canon 1295 concerns acts of administration, the requirements stipulated in this canon are the same as those established for acts of alienation. Consequently, the Code holds transactions that can worsen the patrimonial condition of a public juridic person and acts of alienation of the stable patrimony of a public juridic person on the same level of importance.¹⁰¹ The risk to the stable patrimony of the public juridic person and the need to preserve and protect this patrimony all point to the fact that the Code does not consider canon 1295 transactions as acts of ordinary administration. The implication is that any transaction which can worsen the patrimonial condition of a public juridic person constitutes an act of extraordinary administration. Supporting this conclusion, Renken writes:

Acts of extraordinary administration must be clearly defined; absent the clear designation that a certain act of administration is extraordinary, one

⁹⁹ Cf. c. 1292 §2.

¹⁰⁰ RENKEN, "Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295," 510. Cf. MYERS, "Book V: The Temporal Goods of the Church (cc. 1254-1310)," 881-882.

¹⁰¹ Cf. DE PAOLIS, *De bonis Ecclesiae temporalibus: Adnotationes in Codicem, Liber V*, 107.

must conclude that it is ordinary and that its administrator can perform the act validly without the prior written faculty of the ordinary. Still, given the significant threat to the patrimonial condition of a public juridic person involved in canon 1295, it seems that the canon concerns an act which by its very nature is an act of extraordinary administration.¹⁰²

6.2 — Canon 1295 Transactions

Any transaction which could worsen the stable patrimonial condition of a juridic person must follow the requirements articulated in canons 1291-1294.¹⁰³ However, the Code does not identify these transactions. What is clear is that canon 1295 concerns contracts, specifically *threatening contracts*.¹⁰⁴ The *Black's Law Dictionary* defines a contract as “[an] agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law [...]; or a promise or set of promises by a party to a transaction, enforceable or otherwise recognizable at law [...]”¹⁰⁵ In the case of canon 1295, what makes a contract *threatening* is the risk or the potential loss of ownership or control of stable patrimony.¹⁰⁶ The actual loss of ownership or control of the stable patrimony is not necessary to qualify an act as *threatening*. The sheer risk or the potential threat of such harm to the stable patrimony is sufficient.¹⁰⁷ Renken writes:

When a transaction governed by canon 1295 occurs, ownership is not transferred—but the ownership is reasonably judged to be threatened by the transaction. Alienation focuses *ad extra*—on passing ecclesiastical goods to another; a transaction governed by canon 1295 focuses *ad intra*—on protecting ecclesiastical goods which one wishes to retain as stable patrimony.¹⁰⁸

As such, transactions that fall under the scope of canon 1295 are transactions that involve risky or threatening contracts that make vulnerable the

¹⁰² RENKEN, “Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295,” 513.

¹⁰³ The equivalent of canon 1295 of the *CIC/83* in the *CCEO* is canon 1042. Cf. G. NEDUNGATT, (ed.), *A Guide to the Eastern Code: A Commentary on the Code of Canons of the Eastern Churches*, Rome, Pontificio Istituto Orientale, 2002, 703-707.

¹⁰⁴ RENKEN, “Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295,” 506. Cf. JUNG, *Transactions Which May Worsen the Patrimonial Condition of a Public Juridic Person in the United States: A Study of Canon 1295*, 108.

¹⁰⁵ *Black's Law Dictionary*, 389.

¹⁰⁶ RENKEN, “Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295,” 507.

¹⁰⁷ Cf. KENNEDY, “Book V: The Temporal Goods of the Church [cc. 1254-1310],” 1503.

¹⁰⁸ RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 282.

stable patrimony of a public juridic person. When an administrator of ecclesiastical goods engages in such transactions, the stable patrimony of the public juridic person is at risk of being diminished. In the United States, the USCCB issued the following guidelines for discerning what constitutes transactions falling under the scope of canon 1295.

The application of canon 1295 is contingent on the level of risk and on the economic condition of the public juridic person. The canon deals with such matters as the transfer of rights such as easements, mortgages, liens, and options as well as with incurring debt, including guarantees, surety and gift annuities, and the making of unsecured loans. The canon encompasses accepting an obligation, giving up a right, assuming a debt, or being responsible for the liability of another.¹⁰⁹

In addition to the USCCB's guidelines, the following commentators' observations regarding canon 1295 transactions are helpful. Francis Morrisey writes:

Among the acts which would certainly come under [canon] 1295, we could list the following: (a) borrowing money; (b) taking out mortgages; (c) entering into long-term leases; (d) changing the status of ownership (such as turning over certain properties to secular boards).

These acts would be subject to the prescriptions of the canon because, in one way or another, they risk jeopardizing the stable patrimony of the [juridic] person. Three elements usually enter into account when determining whether there is a risk of jeopardy: (a) loss or diminishing of *ownership*; (b) loss or diminishing of *sponsorship*; (c) loss or diminishing of *control*.¹¹⁰

Robert Kennedy writes:

Mortgaging a parcel of real estate or pledging valuable items of personal property as collateral to secure the repayment of a loan are often given as examples of canon 1295 transactions, as are granting easements, licenses, liens, or options to purchase, contracting to pay annuities, making unsecured loans, acting as guarantor or surety, transferring operational control of one's assets while retaining ownership, and incurring debts even if unsecured by collateral. Such a listing can be misleading, however, since each of the examples may or may not be a canon 1295 transaction depending upon the potential impact upon the overall patrimonial condition of the public juridic person. The application of canon 1295 is necessarily relative, depending on

¹⁰⁹ USCCB, *Diocesan Financial Issues*, 2002 (Revised January 2009), p. XV-6, available at: <http://www.usccb.org/about/financial-reporting/upload/Diocesan-Financial-Issues-Manual.pdf> (last accessed 26 March 2017).

¹¹⁰ F.G. MORRISEY, "The Alienation of Temporal Goods in Contemporary Practice," in *Studia canonica*, 29 (1995), 311.

both the degree of risk involved and the economic condition of the public juridic person.¹¹¹

Finally, Jerome Jung writes:

Canon 1295 makes the [canonical] requirements for alienation applicable to transactions which, although not alienations, may nonetheless worsen the patrimonial condition of a public juridic person. The [canon] is intentionally general and open-ended. It purports to cover a large class of transactions which are not alienations as such, but which can generate effects (sometimes inadvertently) similar to alienations, or which can otherwise expose a public juridic person to the risk of economic harm. The most obvious examples of such transactions include mortgaging or pledging property, granting easements, and corporate restructuring.¹¹²

Consequently, the above commentators (along with the USCCB's guidelines) seem to agree that canon 1295 transactions share two major characteristics. The first characteristic is that these transactions are both risky and full of uncertainties. Canon 1295 transactions are risky because they can potentially expose the stable patrimony of a public juridic person to being reduced or completely depleted. The second characteristic is that these transactions¹¹³ provide little to no reassurance that the patrimonial condition of a public juridic person will remain uncompromised. Thus, the risks and the uncertainties involved in canon 1295 transactions make them threatening to the patrimonial condition of the public juridic person—thus, the need to safeguard the stable patrimony of a public juridic person is justified.¹¹⁴

¹¹¹ KENNEDY, "Book V: The Temporal Goods of the Church [cc. 1254-1310]," 1502. While Kennedy makes a strong argument concerning the subjective nature regarding the application of canon 1295, this does not mean that the applicability of canon 1295 is based solely on a subjective criterion. Canon 1295 refers to canon 1292, which specifically refers to the minimum and maximum spending limits defined by the conference of bishops, and that these spending limits are to be used as criteria to determine whether permission is required to place such transactions. Thus, it is arguable that canon 1295 does have an objective criterion to determine what constitutes a threatening contract or transaction which can worsen the patrimonial condition of a public juridic person. Renken writes: "Inasmuch as canon 1295 requires also the observance of canon 1292, however, there can be no doubt that canon 1295 requires permission from superior authorities only for threatening transactions beyond certain legitimately determined amounts. The universal law does not require permission from competent authority to enter threatening contracts if the monetary amount involved is below the legitimately established figure." RENKEN, "Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295," 512.

¹¹² J.L. JUNG, "Property Transactions That May Jeopardize the Patrimonial Condition of Public Juridic Persons in the Church," in *Catholic Lawyer*, 41 (2001), 86.

¹¹³ Such transactions may include unsecured loans, mortgaging or pledging property, corporate restructuring, etc.

¹¹⁴ Cf. DE PAOLIS, *De bonis Ecclesiae temporalibus: Adnotationes in Codicem, Liber V*, 107.

6.3 — Reorganization Bankruptcy as a Canon 1295 Transaction

In the United States, reorganization bankruptcy¹¹⁵ can found under *Title 11* of the federal Bankruptcy Code. Also known as Chapter 11 bankruptcy, reorganization bankruptcy provides a collective forum for resolving financial concerns, as well as a framework to modify the debtors' relationship with their creditors.¹¹⁶ The reasons to file for bankruptcy can vary.¹¹⁷ But whatever the circumstance may be, filing for reorganization bankruptcy should be understood as a strategy to ensure that stable patrimonial condition of the public juridic person is not endangered, to continue the work of the institution, and to equitably compensate creditors.¹¹⁸ However, considering the risky and uncertain nature involved in a reorganization bankruptcy proceeding and how the stable patrimonial condition of a public juridic person can be jeopardized, the filing of a Chapter 11 bankruptcy qualifies as a canon 1295 transaction.¹¹⁹

The term *bankruptcy* does not appear in the *CIC/83*. Still, several civilly incorporated public juridic persons have filed for bankruptcy in the United States in recent years. Accordingly, it is practical to ask the following questions: How should a public juridic person that has civil incorporation deal with the prospect of having to file for bankruptcy in the United States? Is the filing of bankruptcy contrary to canon law? How will the patrimonial condition of a public juridic person be impacted in a bankruptcy filing, and can there be any guarantee that it will not be worsened in the process? Finally, should the filing of bankruptcy be considered an act of extraordinary administration under canon law?

¹¹⁵ While there are different types of bankruptcy filing options for corporations in the United States, it is arguable that, for civilly incorporated public juridic persons in financial distress, petitioning for reorganization bankruptcy under a Chapter 11 bankruptcy is the most viable alternative under both civil law and canon law. Moreover, the language of canon 1295 is most conducive to a reorganization bankruptcy proceeding rather than, for example, a Chapter 7 (or liquidation) bankruptcy.

¹¹⁶ SKEEL, "When Should Bankruptcy Be an Option (for People, Places, or Things)?" 2223.

¹¹⁷ J.T. O'REILLY and M.S.P. CHALMERS, *The Clergy Sex Abuse Crisis and the Legal Responses*, New York, NY, Oxford University Press, Inc., 2014, 111. For some extensive analysis of the reasons religious institutions file for bankruptcy in the United States, see P. FOOHEY, "Bankrupting the Faith," in *Missouri Law Review*, 78 (2013), 719-776 and J.C. LIPSON, "When Church Fails: The Diocesan Debtor Dilemmas," in *Southern California Law Review*, 79 (2006), 364-455.

¹¹⁸ JARBOE, "Bankruptcy—The Last Resort: Protecting the Diocesan Client from Potential Liability Judgments," 155. Cf. FOOHEY, "When Churches Reorganize," 277-306.

¹¹⁹ Cf. M. WELCH, "Sponsorship," in P.J. COGAN (ed.), *Selected Issues in Religious Law*, Washington, DC, Canon Law Society of America, 1997, 106.

One of the goals of a Chapter 11 bankruptcy is to arrive at a viable reorganization plan—one that allows the business corporation to retain some of its assets to continue functioning while at the same time meeting some of its debt obligations. Accordingly, a reorganization plan articulates “[a] financial restructuring of a corporation, [especially] in the repayment of debts, under a plan created by a trustee and approved by a court”¹²⁰ while setting some assets aside for the basic operation of the corporation.¹²¹ Consequently, one of the primary purposes of a reorganization plan is to establish a contractual agreement between debtors and creditors to reorganize outstanding debts and pave a way forward for all parties involved.¹²²

Under canon law, concerns regarding the patrimonial condition of the public juridic person necessarily arise in a bankruptcy filing. Obviously, issues of ownership and/or the potential transfer of control of stable patrimony outside a public juridic person in a civil legal proceeding cannot ignore canon law. The bankruptcy process would inevitably put the patrimonial condition of a public juridic person in a predicament since there is very little guarantee in a bankruptcy process that the stable patrimony of the public juridic person will be protected.¹²³

Even if there can be some guarantee that no stable patrimony will be diminished in a Chapter 11 proceeding, the diminishment of the other ecclesiastical goods could still have a negative impact on the patrimonial condition of the public juridic person. As Jung clearly notes, “any transaction which may adversely affect the value of the patrimony may be subject to canon 1295, even though the patrimony in question is not subject to physical loss or damage.”¹²⁴ Consequently, the presence of risks and uncertainties in a Chapter 11 bankruptcy filing are enough to constitute a

¹²⁰ *Black's Law Dictionary*, 1490.

¹²¹ S.L. SCHWARCZ, “Basics of Business Reorganization in Bankruptcy,” in *Journal of Commercial Bank Lending*, 68 (1987), 83.

¹²² Harvey Miller and Shai Waisman write: “The use of Chapter 11 [reorganization bankruptcy] persists because of its unique ability to bring all parties in interest to the table [...], marshal assets and liabilities of a debtor, and effect an efficient resolution of all of the claims against the debtor. Chapter 11, through procedures such as estimation and the use of reserve, can even address and resolve unknown or contingent liabilities.” H.R. MILLER and S.Y. WAISMAN, “Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?” in *American Bankruptcy Law Journal*, 78 (2004), 195.

¹²³ Cf. M.E. CHOPKO, “Principal Civil Law Structures: A Review – Getting Civil Law Right: Canonical Criteria for Parish Civil Structures,” in *The Jurist*, 69 (2009), 231-260.

¹²⁴ JUNG, *Transactions Which May Worsen the Patrimonial Condition of a Public Juridic Person in the United States: A Study of Canon 1295*, 320. Additionally, there is no reason to justify that the requirements of canon 1295 are not applicable to public juridic persons engaging in civil litigation; rather, Jung argues that these requirements apply. *Ibid.*, 133.

canon 1295 transaction because, *by its very nature*, the filing of bankruptcy will worsen the patrimonial condition of the public juridic person.¹²⁵

Conclusion

Juridic persons in canon law have the right to acquire, retain, administer, and alienate temporal goods. To ensure that ecclesiastical goods are properly maintained, protected, and used appropriately, the Code distinguishes acts of ordinary administration from acts of extraordinary administration based on the nature and gravity of the acts, and it requires extra measures to be taken when acts of extraordinary administration are involved. The Code also recognizes the variety of local economic circumstances and grants conferences of bishops the right to determine what constitutes acts of ordinary administration and acts of extraordinary administration for juridic persons under them. Similarly, the Code grants diocesan bishops and major superiors of religious institutes—through their particular law or their proper law, respectively—the competency to determine for themselves acts of administration that rise above acts of ordinary administration.¹²⁶ For example, in the case of dioceses, the diocesan bishop is competent to determine for juridic persons in his diocese what constitutes acts of ordinary administration which are more important under the economic condition of the diocese; criteria for such acts should be included in the particular law of a diocese.¹²⁷

Beyond acts of extraordinary administration and acts of alienation of ecclesiastical goods, however, there are transactions that fall under canon 1295. These are transactions which can worsen the patrimonial condition of public juridic persons. Since transactions under this category can harm the patrimonial condition of a public juridic person, canon 1295 stipulates that the same kind of precautions should be taken for them as if they are acts of extraordinary administration or acts of alienation of the stable patrimony of a public juridic person.

The filing of reorganization bankruptcy most appropriately fits under canon 1295. Unlike in a liquidation bankruptcy, a reorganization bankruptcy allows the bankrupt corporation to retain both ownership and control of its assets while reorganizing its debts. It is arguable that, for civilly incorporated

¹²⁵ Cf. RENKEN, "Acts of Extraordinary Administration of Ecclesiastical Goods in *Book V* of the CIC," 594.

¹²⁶ Cf. LOURDUSAMY, "Canonical Perspective on Social Justice and Charity," 498.

¹²⁷ Cf. RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish*, 111-116.

public juridic persons in financial distress, petitioning for reorganization bankruptcy under a Chapter 11 bankruptcy is the most viable alternative under both civil law and canon law. Moreover, the language of canon 1295 makes the filing of bankruptcy protection possible.

As a consequence of litigation related to the various scandals in recent years in the United States, a number of Catholic institutions have had a difficult time managing the financial fallout. Unequivocally, persons and organizations responsible for any atrocious act against vulnerable persons should be held accountable to both canon law and civil law. However, to use stable patrimony to pay for damages related to these litigations is incompatible with canon law. Consequently, the filing for Chapter 11 reorganization bankruptcy should be considered as a viable option for a civilly incorporated public juridic person that is in financial distress. By filing for bankruptcy protection under Chapter 11, a civilly incorporated public juridic person in the United States could, under bankruptcy law, ensure that its stable patrimony is protected, thus fulfilling the mandate of canon law. In short, when a civilly incorporated public juridic person files for Chapter 11 reorganization bankruptcy, it acts prudently under both canon law and bankruptcy law by engaging in a proactive conversation with all interested parties to compensate creditors while retaining possession and control of the juridic person and its assets for the purpose of continuing its works and ministries.

MERCY AND DUE PROCESS IN RELIGIOUS INSTITUTES*

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SUMMARY — The A. examines factors related to the establishment of procedures for addressing non-penal misconduct cases in religious institutes. An accusation of misconduct is considered *non-penal* when it violates divine law, canon law or proper law but is not also a *delict* according to ecclesiastical law. Since such cases fall under the discretionary authority of superiors to resolve, the question arises regarding the best way to structure the use of that discretionary authority so as to achieve the best possible result for everyone concerned without the superior exceeding his or her power and also respecting the rights of everyone concerned, especially those of the accused. The author examines the issues of discretionary authority, canonical equity and mercy, canon law related to the administration of discipline in religious institutes, limits on the powers of superiors, the situations which call for such a procedure, and, when necessary, how to make decisions to protect people from future harm. It concludes with a summary of the key principles that should guide such procedures and a sample set of procedures.

RÉSUMÉ — L'A. examine certains facteurs liés à l'élaboration de procédures pour le règlement des cas non pénaux d'inconduite dans les instituts religieux. Une accusation d'inconduite est considérée *non pénale* lorsque l'acte viole le droit divin, le droit canonique ou le droit propre, mais n'est pas un *délit* selon le droit ecclésiastique. Puisque de tels cas sont soumis à l'autorité discrétionnaire des supérieurs pour leur règlement, on peut se demander quelle est la meilleure manière de structurer l'usage de cette autorité discrétionnaire afin d'assurer le meilleur résultat pour tous ceux concernés sans que le supérieur ne dépasse les limites de son pouvoir tout en respectant les droits de tous, spécialement ceux de l'accusé. L'A. examine les questions de l'autorité discrétionnaire, de l'équité canonique et de la miséricorde, du droit

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canonique lié à l'administration de la discipline dans les instituts religieux, des limites aux pouvoirs des supérieurs, des situations qui exigent une telle procédure et, lorsque c'est nécessaire, de la façon de prendre des décisions pour protéger les personnes d'un dommage futur. L'article termine avec un sommaire des principes-clés qui devraient guider l'élaboration de telles procédures et un exemple de ces procédures.

Introduction

As we approach the end of the Year of Mercy, I would like to look at how best to handle accusations of misconduct by religious, when both the universal law of the Church and the proper law of the religious institute provide little or no *direct* guidance. It is not obvious to everyone that disciplinary procedures are acts of mercy. But, when carried out with evangelical charity and equity, for the purpose of reforming the wayward and protecting the innocent, they most certainly are. In his book, *Mercy*, Cardinal Walter Kasper writes:

The extensive breakdown of church discipline is one of the weaknesses in the contemporary church. It represents a misunderstanding of what the New Testament means by mercy and what the pastoral dimension of the church means. The dismantling of a rigid, legalistic praxis, without simultaneously building up a new praxis of church discipline that conforms to the gospel, has led to a vacuum, which has permitted scandals that have led to a serious crisis in the church. Only recently, in the context of the horrifying cases of sexual abuse, does one appear to recollect that church discipline is necessary.¹

This study seeks to contribute to this building up of a healthy new praxis in the Church, especially in the context of religious life.

When there is a possible violation of the Church's penal law, it is often very clear how those in leadership must address the case. Furthermore, most religious institutes or provinces in North America have guidelines or protocols in place for addressing allegations of sexual misconduct by their members. But what about non-sexual cases of misconduct? Or, put another way, how should a religious institute address an accusation of behaviour that is clearly immoral and/or illegal—a violation of divine, natural or ecclesiastical law—but not explicitly defined as a *delict* in any law? How ought a religious superior address accusations of grave misconduct against members that have *not* been foreseen by any existing laws, guidelines or protocols? Possible

¹ W. KASPER, *Mercy: The Essence of the Gospel and the Key to Christian Life*, translated by W. MADGES, New York, Paulist Press, 2013, 175.

forms of non-penal misconduct are limitless, of course, but specific examples might be religious who attempt to conceal major traffic offences, such as, driving under the influence; are accused of frequenting casinos or disreputable places; appear to be friends with people publicly opposed to the Catholic faith or persons associated with organized crime; are regularly absent from the community without permission; who possess luxury items the community did not buy or fund; who use threatening or inappropriate language toward fellow members of the community or employees.

Some would say that such cases are so rare, they can be left to judgment of the province leader and his or her council to address however they deem appropriate. But leaving the responses to such cases unstructured is not without significant risks to the rights of the accused, the accuser and possibly even the public. Such a “spontaneous” response is likely to be sufficient and just in cases where the accused readily admits his or her misdeed and accepts responsibility, but what about when the accused denies responsibility? Or what if the accused accepts responsibility, but the behaviour in question represents a potential threat to the safety and wellbeing of others? To accompany a member on a journey of healing and reconciliation, as he or she faces the brokenness that is part of every Christian’s life, is to be expected of one’s institute and its superiors. But what about when the brokenness in question represents a danger to others?

In this paper, we will look at discretionary authority, canonical equity (of which mercy is a fundamental element), as well as the canons that protect the rights of religious and impose limits on the authority of religious superiors, as well as the questions of when to use a non-penal disciplinary procedure and when a protective measure is unjust. Lastly, we will summarize the essential principles that should guide every non-penal disciplinary procedure.

1 — *Discretionary Authority*

As canon 619 makes clear, the duties of a superior encompass much more than just governing, and governing involves much more than simply executing the law. The law cannot anticipate every eventuality, and many aspects of life happily require little or no legal oversight. Our topic is in the decidedly grey area wherein people in consecrated life are considered to have violated a law or moral precept without crossing the line into the area where penal law is operative. In such cases, superiors have a duty to act for the good of the member, the institute, the Church and the common good.

Superiors do so in light of their discretionary authority and are assisted by the concept of canonical equity, of which a key element is mercy. The concepts of discretionary authority and canonical equity are highly relevant to the expression and protection of rights in religious life.

As important as discretionary authority is in the life of the Church, it is a topic about which relatively little has been written.² In describing administrative discretion, Beal states the following:

Administrators, both civil and ecclesiastical, have discretion whenever the effective limits on their authority leave them “free to make a choice among possible courses of action or inaction” [Kenneth C. Davis, *Discretionary Justice*]. The authority to execute the law and, where necessary, to interpret and complete the law that is enjoyed by diocesan bishops and those who exercise authority under their supervision (as well as by competent authorities in religious institutes and at the supradiocesan level), of necessity leaves office holders with broad discretion. For example, officials at all levels of church governance make countless decisions about hiring, firing and supervising employees; administering church property; granting and denying access to the sacraments, to Catholic education, and to other helps to salvation; and setting institutional policies that affect the lives of those they serve. All of these decisions of church officials are, in large measure, discretionary. As Gunther Raab has observed: “Empowerment for acting according to discretion is probably more important in canon law than in civil law.”³

Discretionary authority is rightly understood as the broad, undefined authority that a superior has to carry out his or her office.⁴ This “undefined authority” is necessary to allow superiors to handle the everyday matters of governance expeditiously. Beal observes wisely:

Discretionary authority is indispensable and not necessarily injurious to the rights of persons, but it is not without its dangers. Both in the Church and

² Beal states, “Canonists acknowledge the distinction between law and discretion but devote most of their time to analysis of law. Canonists have produced a considerable body of literature about administrative tribunals and other institutes for remedying injustices resulting from ecclesiastical administration, but they have produced no comparable body of literature about methods for preventing injustices arising from the exercise of discretionary authority by church officials. Nonetheless, there is great need and great promise for improvement of the quality of justice rendered to individuals in the administrative process of the Church by systematic attention to those areas where decisions are largely dependent on discretion and judicial remedies are largely irrelevant.” J.P. BEAL, “Confining and Structuring Administrative Discretion,” in *The Jurist*, 46 (1986), 70 (= BEAL, “Administrative Discretion”).

³ *Ibid.*, 70-71.

⁴ Canon 596 §1 states simply, “Superiors and chapters of institutes possess that power over members which is defined in universal law and the constitutions.”

in civil society, broad discretionary authority may be a threat to justice if it is not adequately controlled. Although discretionary authority is necessary to adapt decisions to unique facts and circumstances, there is no guarantee that administrative discretion will always be guided by facts and circumstances truly relevant and significant to a case. Although discretionary authority is necessary to deal with unforeseen and unforeseeable situations, there is no guarantee that discretion will be exercised consistently, predictably, impartially and fairly when dealing with the foreseen and foreseeable.⁵

While most of the literature regarding the exercise of discretionary authority concerns ways of seeking redress once that authority has been misused,⁶ our purpose in this paper is to help ensure that such authority is used appropriately from the start.

For the sake of justice and the credibility and integrity of religious institutes, the exercise of discretionary authority must be careful, wise and discerning, especially where the exercise of rights is concerned. Beal cautions:

Both in civil society and in the Church, broad discretionary authority can create the climate in which officials can, in fact, be unjust as well as the climate in which their actions can be *perceived* as unjust. The perception of injustice can easily erode legitimacy of the authority of civil and ecclesiastical officials and the moral authority of their decisions. When church authorities exercise their discretion in a manner that is, in fact, unjust or when affected individuals and the faithful at large perceive their discretionary decisions as unjust, the consequences of real or perceived injustice reach far beyond the individual case. The very credibility of the Church as a herald of the gospel is called into question.⁷

While it is easy to imagine that disciplinary cases typically need to be handled with some degree of confidentiality, it is important that all those involved are at least informed about the process that is being followed. Making decisions behind closed doors is far from ideal, and one would hope that

⁵ Ibid., 72.

⁶ Much has been written regarding the possibility of establishing tribunals or other means in which the laity especially can vindicate their rights which may have been violated by acts of administration. See CANON LAW SOCIETY OF AMERICA, *Protection of Rights of Persons in the Church*, Washington, CLSA, Washington, 1991; K. MARTENS, "Protection of Rights: Experiences with Hierarchical Recourse and Possibilities for the Future," in *The Jurist*, 69 (2009), 646-702; J.P. BEAL, "Protecting the Rights of Lay Catholics," in *The Jurist*, 47 (1987), 129-164; J.N. PERRY, "The Accessibility of Due Process for the Laity," *CLASP*, 51 (1989), 65-82; J.H. PROVOST, "Promoting and Protecting the Rights of Christians: Some Implications for Church Structure," in *The Jurist*, 46 (1986), 289-342.

⁷ BEAL, "Administrative Discretion," 73-74.

the procedures to be followed in these sorts of cases would be made public even before a complaint was made.

Clear, just and rational disciplinary procedures serve to respect the equality of all the faithful.⁸ A superior who acts arbitrarily (or who gives the impression of doing so) acts with disregard for the dignity of his or her subjects. Beal addresses this question when he writes:

Administrative procedures that alienate affected persons and damage their sense of dignity do not promote but squelch the organic development of love, grace and charisms in the life of the Church. Fair procedure is required not only for accurate decision-making but also for preservation and promotion of ecclesial communion. Nevertheless, the highly unstructured discretionary authority of many ecclesiastical officials at all levels of church governance creates a danger that discretion will be unintentionally abused and ecclesial communion will be disrupted.⁹

The essential elements of such disciplinary procedures will be discussed later.

2 — *Canonical Equity and Mercy*

Associated with the concept of discretionary authority is the concept of canonical equity. If discretionary authority is that loosely defined authority that a superior has to carry out his or her duties, canonical equity is a concept that is essential in guiding how that undefined authority should be used.

Pope Paul VI chose canonical equity as the topic of his annual address to the Roman Rota in 1973. In it, he states:

From its beginning the Church absorbed into its life all that was true, noble, just and beautiful in societal life and in man's aspirations. In this way it made God's charity shine forth in the humanity divinized by the Spirit of love. Equity represents one of man's loftiest aspirations. If societal life requires the determinations of human law, nevertheless the norms of this law, inevitably general and abstract, cannot foresee the concrete circumstances in which the laws will later be applied. Faced with this problem, jurisprudence has sought to amend, to rectify, to correct the "rigor of the law." This is done through the operation of equity, which somehow embodies man's aspirations for a better kind of justice.¹⁰

⁸ Cf. c. 208

⁹ BEAL, "Administrative Discretion," 97-98.

¹⁰ PAUL VI, address to the Sacred Roman Rota, 8 February 1973, in AAS, 65 (1973), 99, English translation in *The Pope Speaks*, 18 (1973), 79.

In this way, we see that Paul VI views equity as an essential part of the law and as a quintessentially Christian part of its practice.

Coughlin describes equity in the following manner:

Equity is "the application of objective justice to a concrete case." It arises because "the rules that a society imposes on its members, in order to protect the common good and promote justice, figure as too general in conception to deal with all the particular instances that fall under their scope." "Justice is the ideal," and "equity serves as the means for the realization of the ideal in practice." Equity is constituted from "the benevolent interpretation of written law by judges, administrators and superiors." It is "a relative notion which reckons a superior principle of justice or of moderation in the application of law."¹¹

In understanding the role of canonical equity, it will be helpful to take a brief look at its origins and development. In discussing the development of the concept "canonical equity," Coughlin recognizes the "sundry shifts in the meaning and application of the notion."¹² He observes that the concept emerged in the legal renaissance of the eleventh and twelfth centuries, following the rediscovery of Justinian's *Digest*. He goes on to note, however, that ancient Roman sources were not the only influence on this legal renaissance, but that medieval canonists also drew upon "scriptural texts, canons of ecumenical and local councils, decrees of the popes, rules contained in various penitentials and virtually any other source that pertained to some aspect of ecclesiastical law."¹³ Included in these developments was Gratian's distinction between divine law, natural law, positive law, and customary law. Coughlin notes:

On the basis of these distinctions, Gratian distinguished between immutable principles of eternal validity and elements of law which had been suggested by the particular circumstances of time, place and persons.... The content of equity then consisted in part of those universal and unchanging values known as the natural law. This superior justice corrected the positive law.... Gratian eschewed the rigour of a strictly natural justice as incompatible with the Gospel. The insight that evangelical justice tended to be synonymous with love, compassion and mercy may be said to adumbrate canonical equity as a distinct concept.¹⁴

Gratian's insights were built upon and enlarged by Hostiensis, who "envisioned canonical equity as critical to the legislative, judicial and executive functions

¹¹ J.J. COUGHLIN, "Canonical Equity," in *Studia canonica*, 30 (1996), 404 (= COUGHLIN, "Canonical Equity").

¹² *Ibid.*, 406.

¹³ *Ibid.*, 408.

¹⁴ *Ibid.*, 410-411.

of ecclesiastical law.”¹⁵ Coughlin concludes his examination of this period by commenting:

Both Gratian and Hostiensis rejected the stringent character of Roman law as in conflict with the unique aims of canon law. Roman law was considered by its practitioners and adherents to be fixed, immutable and finished... In contrast, the notion of canonical equity in the thought of Hostiensis reflected the characteristic of organic development. While the canonists shared the classicists’ deep respect for tradition, they continually attempted to incorporate into the juridical structure of the law the ecclesiological perspective of the Church as mystical communion founded upon evangelical precepts. Moreover, the canonists’ task was necessarily an ongoing one as it was open to the dynamic action of divine grace in human history. The ability of the medieval canonists to assimilate both immutable principles and historical circumstances into the corpus of law yielded the concept of canonical equity.¹⁶

St. Thomas Aquinas further developed the concept of equity. For St. Thomas, equity was “an aspect ... of justice, by which the overly stringent application or interpretation of some positive law might be measured and, if necessary, corrected.”¹⁷ But equity was an exception to the law, not an abrogation of the law, and only those with the authority to do so could invoke it. In cases where that authority could not be approached within the available time, however, equity applied automatically.¹⁸ St. Thomas also held that equity could

¹⁵ Ibid., 411.

¹⁶ Ibid., 412-413.

¹⁷ Ibid., 414. Cf. ST. THOMAS AQUINAS, *Summa Theologiae: Latin Text and English Translation, Introductions, Notes, Appendices, and Glossaries*, Cambridge, Cambridge University Press, 1966, 1a-2ae, q. 96, a. 6, pp. 136-141 and 2a-2ae, q. 120, a. 1, pp. 276-279 (= *ST*).

¹⁸ At this point, some might notice certain similarities between the concept of equity and the eastern Christian concept of *oikonomia*. Coughlin rejects such comparisons, describing *oikonomia* as “a nonlegal device employed by a bishop or synod of bishops to resolve an inextricable legal conundrum” (COUGHLIN, “Canonical Equity,” p. 404). Wijlens admits there are similarities but strongly cautions against a “simplistic” comparison, given the distinctness of the two legal traditions and their “different ecclesiological foundations.” She notes, however, that, “both are deeply linked with the authentic purpose of ecclesial legal action to serve the *salus animarum*.... Both institutions are concerned with concrete and particular cases; they do not create precedence. Both allow for taking into account those circumstances in a case which do not belong to the strict juridical level. They make it possible to uphold different values that the law alone could not do. They can create a good balance between legal certitude and justice.” On the other hand, she notes three differences: first, “Orthodox theologians use an inductive method to describe *oikonomia*,” whereas Latin theorists typically discuss equity in the abstract, without any reference to specific examples. Second, *oikonomia* is exercised exclusively by a bishop or synod of bishops, whereas canonical equity “is within the task of all who apply the law, including bishops as well. The third difference is that *oikonomia* does not create a precedent. Therefore it is not an instrument

be invoked “for the common good, and not for the sake of an individual alone.”¹⁹ Since St. Thomas considered equity as an aspect of justice, a principle of natural law, he did not explicitly associate it with any evangelical precepts and did not distinguish equity from canonical equity. It goes without saying, however, that all of St. Thomas’s thought was undergirded by a Christian anthropology, not a classicist worldview. St. Thomas saw the world and everything in it as constantly unfolding and being shaped by divine grace.²⁰

In this brief sketch, we see the origins of the above-mentioned characteristics of canonical equity, namely, natural equity, evangelical compassion [mercy], and historical consciousness. Such values, deeply rooted and long valued in our canonical tradition, can only serve to support and guide the administration of discipline in religious institutes.

3 — *Canons Relevant to the Administration of Discipline*

In this section, we will examine the rights that potentially bear on disciplinary cases involving religious, in the order they appear in the code.

Canon 18 states: “Laws which establish a penalty, restrict the free exercise of rights, or contain an exception from the law are subject to strict interpretation.” This principle of interpretation can be regarded as a right granted by the positive law of the Church to all of those subject to its law, in order that no one may suffer a penalty, or in any way have his or her rights restricted, except in strict accordance with the law. This law clearly intends to keep those with authority from acting in ways that cannot be explicitly justified by the law. This canon is of key importance as we consider the best way to proceed in disciplinary cases not expressly covered by the law. It will be an integral part to our later discussion regarding the limits on the authority of superiors. As we have discussed above, superiors have broad authority, but that authority is not without limits, and superiors must use the authority they receive from the Church in accordance with the mind of the Church, that is, in accordance with its law, doctrine, and of course, the evangelical tenet of mercy and its canonical counterpart, equity.

for legal development; it cannot touch upon the dignity and continuous validity of the old canons, while *aequitas canonica* can be instrumental in the dynamics of legal development.” See M. WIJLENS, “*Salus Animarum Suprema Lex*: Mercy as a Legal Principle in the Application of Canon Law?” in *The Jurist*, 54 (1994), 581-582.

¹⁹ COUGHLIN, “Canonical Equity,” 414. Cf. *ST*, 2a-2ae, q. 120, a. 1, pp. 276-279.

²⁰ Cf. COUGHLIN, “Canonical Equity,” 418-419.

The next right we will examine is the one expressed in canon 220, namely, the right to one's good reputation and to privacy.²¹ In handling disciplinary matters, superiors have the duty to ensure that the good reputation of the accused is protected throughout the process, especially in the period before the veracity of the accusation has been determined. Yet, even after it is certain that misconduct has been committed, the wrongdoer remains entitled to his or her good reputation, although there are exceptions to this principle. The most obvious exceptions are the need to limit scandal among those who are aware of the misconduct and the need to let it be known that justice has been served, lest the credibility and integrity of the Church be harmed.²²

The right to privacy is of the utmost importance, and some commentators²³ point out that a specific expression of this right in the context of religious life is canon 630 §5, which protects members from being forced to manifest their conscience to their superior. In this context, Hill and Bartolac point out that "[p]ersonal privacy protects individuals from unwarranted intrusion into their interior life, the internal forum of contemplation, imagination, unexpressed feelings and ambitions."²⁴ McDonough also makes the point that the authority of superiors extends only to the external forum.²⁵

Canon 221 is the key canon regarding the protection of rights in the Church. In regards to it, Cenalmor says:

[The three paragraphs] state the various rights of the faithful in regard to administration of justice in the Church, and they adopt a series of juridical guarantees for protecting the remaining subjective rights, in order to avoid, among other things, possible abuses which originate in the arbitrary conduct of authority.²⁶

The first paragraph states, "[t]he Christian faithful can legitimately vindicate and defend the rights which they possess in the Church in the competent ecclesiastical forum according to the norm of law." In other words, the faithful may always assert their rights and, when they perceive that their

²¹ For a thorough discussion of the delict of defamation of character, see R.E. JENKINS, "Defamation of Character in Canonical Doctrine and Jurisprudence," in *Studia canonica*, 36 (2002), 419-462.

²² Cf. HILL and BARTOLAC, "Recognition and Protection of Rights," 182.

²³ Cf. *ibid.*, 183.

²⁴ *Ibid.*

²⁵ Cf. E. McDONOUGH, "The Troubling Religious: Further Considerations," in *Review for Religious*, 49 (1990), 620. One exception to this general principle is canon 1047 §4, which grants ordinaries the authority "to dispense from irregularities and impediments not reserved to the Holy See."

²⁶ D. CENALMOR, "Commentary on Canon 221," in *Exegetical Comm*, vol. II/1, 134 (= CENALMOR, "221").

rights have been violated, they may seek redress.²⁷ Cenalmor also points out that:

This right entails a series of derived rights: the right to be assisted by an advocate (cc. 1481 and 1482), the guarantee of initiating a procedure (cc. 1504 and 1505), the right to have economic obstacles (for example, by means of effectively instituting free assistance when needed) and those of other kinds removed, etc.²⁸

These “derived rights” are of special importance in disputes involving religious since, in light of their vow of poverty, they lack the means to finance their own defense. Furthermore, it is not impossible to imagine that religious might face illegitimate attempts to limit either the assertion of their rights or their ability to vindicate rights already violated, under the guise of being obedient to religious superiors.

Canon 221 §2 ensures that anyone called to trial has “the right to be judged according to the prescripts of the law applied with equity.” Although this paragraph speaks specifically of being called to trial, it seems reasonable that the same principle should apply *mutatis mutandis* to our discussion of non-penal disciplinary procedures. That is to say, such procedures should be carried out not only in accordance with the law, but also in accordance with procedures that have been previously established and made known to anyone who might be part of such a procedure.

Canon 221 §3 states: “The Christian faithful have the right not to be punished with canonical penalties except according to the norm of law.” This is a principle of fundamental importance. Hervada comments:

It sometimes happens that, in secular declarations and pacts on human rights, what are really principles of juridical and social order, but not rights, are presented as rights. The same system is used here to preserve, in the form of a right, the *principle of legality* in penal matters (*nulla poena sine lege*). This principle, moreover, is not of divine or natural law but of human law.²⁹

It stands to reason that no one should suffer a punishment outside the law. But, at the same time, no legal system can anticipate every form of misconduct, hence the existence of canon 1399.³⁰ Of course, the application of canon 1399 ought always to be exceptional, that is, “when the special gravity of the violation demands punishment and there is an urgent need to

²⁷ The rights in question are not only those contained in the *CIC* but also those included in particular law, proper law or other sources of law such as contracts. Cf. *ibid.*, 135.

²⁸ *Ibid.*, 137.

²⁹ J. HERVADA, “Commentary on Canon 221,” in *CCLA*, 177-178.

³⁰ We observe, however, that the *CCEO* has no equivalent to *CIC* c. 1399.

prevent or repair scandals.”³¹ Canon 221 §3 ensures that no authority may attempt to impose a canonical penalty apart from the ways permitted by law.³²

Canon 586 preserves the autonomy—“especially of governance”—for each institute. In the context of our broader discussion, we believe this includes the right of institutes to administer their own discipline, within the limits of the law of the universal Church. Certainly, it is within the right of institutes to establish mechanisms or protocols to administer discipline, resolve disputes, and ensure the protection of rights, but to our knowledge no institute has established them. Rather, the only means of challenging a decision of a superior is to approach the higher superior (or superiors) and ultimately the CICLSAL or other relevant dicastery.

In the next section, we will examine the limits on the authority of superiors. This examination will include enumerating the circumstances in which superiors lose the prerogative to discipline their members, as well as the disciplinary actions which they lack the authority to undertake.

Canon 654 states that “[b]y religious profession members ... are consecrated to God and incorporated into the institute with the rights and duties defined by law.” This canon describes the fact that, by profession, a Christian becomes a member of a particular institute and gains the associated rights and duties established in law. The most important right proper to religious is implied in this canon but not stated explicitly, namely, that once one becomes a member of an institute, the person has the right to remain a member. Indeed, the only right proper to religious that is protected by specific juridic procedures is the right not to be dismissed arbitrarily. McDonough writes: “Procedures specifically directed to protecting the rights of religious are practically non-existent in the code except for those relating to the right of a professed member to continue as a member of one’s institute.”³³ This is of fundamental importance to our wider discussion, because dismissal is the only means for disciplining members available in the *CIC* that can be enacted by superiors of all institutes.³⁴ One might assume that, if other

³¹ C. 1399. Cf. also CENALMOR, “221,” 139-140. We have already discussed in the Introduction how, theoretically, many instances of misconduct we propose to be addressed by the non-penal disciplinary procedure could also be addressed under canon 1399. See Introduction, footnote 2.

³² The canonical penalties are described in cc. 1312, 1331-1333, and 1336.

³³ McDONOUGH, “The Protection of Rights,” 203.

³⁴ At the time of writing (January 2017), a proposed revision of *Book VI* and a few other related canons is being circulated by the Pontifical Council for Legislative Texts. The proposal includes enhanced provisions, and commensurate safeguards, for the imposition of penalties

canonical means for administering discipline (that is to say, structured means of administering discipline that ensure the protection of rights) were available, such procedures might reduce the need to resort to dismissal.

In the twelve-canon section on the rights and obligations of religious institutes and their members, canon 670 is the only canon that states a right of individual religious, and even that right is stated indirectly.³⁵ The canon reads: "An institute must supply the members with all those things which are necessary to achieve the purpose of their vocation, according to the norm of the constitutions." In regards to this canon, McDonough remarks:

This requirement includes adequate means to meet both physical and psychological health care needs. However, no institute is required to meet a member's needs only in the manner that is agreed upon or acceptable to that particular member, because individual needs must always be addressed in relation to all the other members of the institute as well as in relation to the institute's material resources.³⁶

When we consider this canon in conjunction with canon 216, the right of all the faithful to promote and support apostolic action, we see a significant grant of rights to individual religious. Rinere points out, however, that the right to participate in the apostolate does not necessarily imply the right to a *particular* apostolate.³⁷ When one considers canon 216 in conjunction with canon 18, it becomes clear that religious cannot be denied their rights to apostolic action and to the necessities of their vocation, except in strict agreement with the law. Of course, institutes must act to promote the common good and preserve the institute itself, but they cannot presume to limit the ministry and religious life of a member except in accordance with the law. To participate in the apostolate is a basic right of all religious and, indeed, of all the faithful, and it may not be limited arbitrarily.³⁸

by means of extra-judicial or administrative decrees. As concerns religious superiors who enjoy the power of governance, this would augment their ability to apply penalties. Cf. PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, *Schema recognitionis Libri VI Codicis Iuris Canonici*, Typis Vaticanis, 2011, esp. cc. 1391 §1, 1333 §2, 1342, and 1720 §2.

³⁵ Cf. G. DI MATTIA, "Commentary on Canon 670," in *Exegetical Comm.*, vol. II/2, 1792. See also, McDONOUGH, "The Protection of Rights", 165. All other canons in this section either impose obligations or exhort religious to certain behaviors.

³⁶ E. McDONOUGH, "The Troubling Religious: Further Considerations," in *Review for Religious*, 49 (1990), 624.

³⁷ E.A. RINERE and A.J. ESPELAGE, "The Disruptive Religious," in *CLASP*, 66 (2004), 186.

³⁸ One can imagine many scenarios in which a superior might decide to limit the external exercise of the apostolate by a member because his or her ministry has become ineffective or potentially harmful. The most common example would be a member who has lost his or her sound judgment due to dementia or some other degradation of natural abilities. Such cases are outside the scope of this paper, but one could imagine that the member might still

4 — *Limits on the Power of Superiors*

We discussed above discretionary authority and noted that it is not defined by a specific grant of powers but, rather, is a general power circumscribed by certain limits. In this section, we will discuss some of those limits.

4.1 — Limits in Virtue of the Authority of Superiors

It is interesting to note that only canon 601 describes the practice of the vow of obedience from the standpoint of subjects, whereas numerous canons describe how superiors must carry out their office.³⁹ Of course, the vow of obedience is central to the living out of religious life, but its development is a vast topic which cannot be examined in great depth here.⁴⁰ We note simply that, in the beginning, the rules and laws governing religious life were “private law.” In other words, although the various communities were recognized as part of the Church, they governed themselves and created and changed their own statutes without the approval of outside authorities. With the passing of time, however, ecclesiastical authorities became increasingly involved in formally establishing such communities, approving their statutes, and exercising varying degrees of oversight in regards to them. Once the Church began to approve the various rules and constitutions of the institutes, what was private law became public law, and the authority that superiors had enjoyed in light of the vow of obedience became authority that they held on behalf of the Church.⁴¹ Therefore, the most fundamental of all limits on the authority of superiors is that expressed in canon 617: “Superiors are to fulfill

be assigned to an apostolate internal to the institute or simply to an apostolate of prayer. In any case, the superior would need to point to objective reasons for limiting the normal exercise of the apostolate, in the event the member challenged the decision.

³⁹ Cf. cc. 617-619, and 626-630. See also A. KAPTJN, “Submission of the Will and Violation of the Vow of Obedience: Contributions to the Discussion of Canon 601,” in *The Jurist*, 56 (1996), 319.

⁴⁰ See N. BAUER, “Three Perspectives on Obedience: Benedict of Nursia, Ignatius of Loyola, and the 1983 Code of Canon Law,” in *The Jurist*, 65 (2005), 55-97; D. KNOWLES, *From Pachomius to Ignatius: A Study in the Constitutional History of the Religious Orders*, Oxford, Clarendon Press, 1966; J.M. LOZANO, *Discipleship: Towards an Understanding of Religious Life*, 2nd ed., Chicago, Claret Center for Resources in Spirituality, 1983; J. SCHAEFER, *The Evolution of a Vow: Obedience as Decision Making in Communion*, Piscataway, NJ, Transaction Publishers, 2008.

⁴¹ Hill writes, “The authority to decide in concrete instances is found in the religious superior. It derives from the constitutions approved and guaranteed by the hierarchical authority of the Church. It does not derive from the consent of the governed. The informed and free religious profession of each individual constitutes him or her as a person henceforth subject

their function and exercise their power according to the norm of universal and proper law.” In truth, all the other limitations on the authority of superiors that we will discuss in the remainder of this section are but sub-species of this single limitation. Of course, the law of the Church includes all divine and natural laws, not every tenet of which is expressly mentioned in the *CIC* or promulgated in other legislation of the Church.

Individuals become members of institutes by professing the evangelical counsels, and their vows are professed to God, mediated through the law of the Church and the institute in question.⁴² Therefore, it makes sense that superiors can invoke the obedience of their subjects only in harmony with the pertinent law. The vow taken to God is absolute, but no superior on earth has the absolute authority to invoke the vow in whatever way he or she pleases but only in ways that would be in accordance with the will of God. While the precise will of God in a particular situation is often difficult to discern, certain things, such as those that are contrary to divine revelation or Church law, can always be excluded. Even the pope himself, supreme legislator of the Church, must obey divine and natural law.

The next limitation on the authority of superiors is that their authority pertains only to the external forum. Huels writes:

A religious, like all members of the faithful, has a constitutional right to privacy (c. 220). This fundamental right is upheld in religious law by a specific injunction directed to superiors: “Superiors are forbidden (*vetantur*) to induce their subjects in any way whatever to make a manifestation of conscience to them” (c. 630, §5).

Under a manifestation of conscience comes all matters of the internal forum, matters such as sins, thoughts, feelings, namely, matters treated in the sacrament of penance, in spiritual direction, and in counseling. These are privileged matters that the member is free to reveal or not reveal to superiors, but superiors are prohibited from using their authority to exact such matters from a subject.⁴³

to the authority of superiors.” R.A. HILL, “Authority and Obedience in Consecrated Life,” in *CLSAP*, 45 (1983), 224-225.

⁴² Cf. c. 618, “Superiors are to exercise their power, received from God through the ministry of the Church, in a spirit of service. Therefore, docile to the will of God in fulfilling their function, they are to govern their subjects as sons or daughters of God and, promoting the voluntary obedience of their subjects with reverence for the human person, they are to listen to them willingly and foster their common endeavour for the good of the institute and the Church, but without prejudice to the authority of superiors to decide and prescribe what must be done.”

⁴³ J.M. HUELS, “Unlawful Command by a Major Superior,” in K.W. VANN and J.I. DONLON (eds.), *Roman Replies and CLSA Advisory Opinions*, Washington, Canon Law Society of America, 1991, 53.

Certainly, the interior life of individual religious is of central importance and, ideally, one's superior would be one of the companions that would assist a member in a time of difficulty. As Huels explains so clearly, however, the superior's *authority* has no place in such intimate matters. Obedience can be demanded only regarding external forum matters, and a charge of disobedience can be leveled only because of a failure to execute some lawful, external forum command. It is also important to recall that canon 1728 §2 states: "The accused is not bound to confess the delict nor can an oath be administered to the accused." Although we are not considering delicts *per se* here, the principle given in the canon would still apply, *mutatis mutandis*.

Another limitation on the power of superiors to command obedience is their duty to respect the rights of their members. The various rights of religious have been discussed earlier and will not be reviewed again in detail here. It is worth noting, however, that the rights which need protection may not always be self-evident. Canon 18 reminds us that even when an ecclesiastical law permits the restriction of rights, the law is subject to strict interpretation. Some rights which might potentially be infringed upon in a disciplinary case could be the right to the sacraments (cc. 213 and 843), the right to live religious life (cf. c. 654), the right to privacy (cc. 220, 630 §5, and 1728 §2), the right to the necessities of religious life (c. 670),⁴⁴ and the right to participate in the apostolate (c. 216).

A further specification of the duty of superiors to use their authority in accordance with the law would include their obligation to obey any specific procedures or mechanisms required by universal or proper law, such as the need to respect the requirements for issuing singular decrees and precepts (cc. 50 and 51), or proper law requirements to consult certain persons before issuing a command under holy obedience. Whatever proper or universal law requires by way of procedure before issuing a command must be respected (e.g., c. 703).

Lastly, superiors can command the obedience of their own subjects only in matters over which the superior has authority or jurisdiction. The proper law of institutes defines the authority of the various superiors regarding territory, persons, and subject matter (c. 622). In addition to not being able to exceed their authority, superiors cannot withdraw or contradict a permission, faculty, or privilege granted to their subjects by a higher authority or law, except in accordance with the rules or laws governing those grants. Nor can superiors overrule or cancel a command or order of a higher authority, except in accordance with the provisions of the law.

⁴⁴ Things which are not necessities (such as exclusive access to a car, generous allowances for spending money, permissions for travel, etc.) could be withdrawn without any process.

4.2 — Limits in Virtue of the Offence

By definition, the non-penal disciplinary procedure that we are proposing would not be applicable in cases that touch the delicts mentioned in *Book VI*. However, one can imagine the scenario where an accusation at first seems to regard non-penal misconduct but, upon further investigation, is seen to touch upon a penal matter. Any superior who is not an “ordinary” in accordance with canon 134 would no longer be competent to proceed and would be bound to refer the case to the appropriate ordinary. For a superior who is not also an ordinary to continue to handle such a case would be a violation of canon 617. Canon 1341 does allow ordinaries to proceed with penal matters in ways other than by a penal process, but only when those means can also repair the scandal, restore justice, and reform the offender. No authority, however, other than the relevant ordinary can make this determination, and even the relevant ordinary cannot do so outside the parameters laid down in canon 1341.

Besides the offences listed in the *CIC*, which are de facto reserved to the authority of one ordinary or another, there are also certain grave crimes against faith and morals that are reserved exclusively to the authority of the CDF.⁴⁵ Were a religious superior to become aware of the possible commission of one of these offences, and he or she was not an ordinary in accordance with canon 134, he or she would have to inform the appropriate ordinary, who would undertake a preliminary investigation in accordance with canon 1717. A religious superior who is both an ordinary and the competent superior of the accused religious could himself conduct the investigation. At the completion of the investigation, if the ordinary were to determine that there is sufficient reason to believe that one or more of the delicts reserved to the CDF has been committed, he would immediately inform the CDF and

⁴⁵ Cf. CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Normae de delictis Congregationi pro Doctrina Fidei reservatis seu Normae de delictis contra fidem necnon de gravioribus delictis*, 21 May 2010, in AAS, 102 (2010), 419-434, English translation, “Revised Norms on Dealing with Clerical Sex Abuse of Minors and Other Grave Offences,” in *Origins*, 40 (2010-2011), 145-152 (= *Norms*). The norms define their areas of competence: “The Congregation for the Doctrine of the Faith, according to art. 52 of the Apostolic Constitution *Pastor Bonus*, judges delicts against the faith, as well as the more grave delicts committed against morals and in the celebration of the sacraments...” (art. 1, §1). “The delicts against the faith referred to in art. 1 are heresy, apostasy and schism...” (art. 2, §1). There are five possible delicts related to the celebration of the eucharist (cf. art. 3) and six possible delicts against the celebration of the sacrament of penance (cf. art. 4), as well as the delict of the attempted ordination of a woman (cf. art. 5). Also reserved to the CDF are the delicts of the sexual abuse of a minor or of someone who habitually has the imperfect use of reason, as well as the possession of pornographic images of persons under the age of 14 (cf. art. 6).

present the elements he has collected. The CDF would then proceed with the case according to its own procedures. Any religious superior who would attempt to address such a delict on his or her own authority, or who, on the contrary, received a credible allegation regarding one of these offences and did not act upon it, would be in violation of canons 617 and 1389.

4.3 — Limits in Virtue of the Penalty

No penal sanction can be imposed apart from the means outlined in the law.⁴⁶ Penal sanctions are divided into medicinal penalties (also called censures)⁴⁷ and expiatory penalties.⁴⁸ They are either *ferendae sententiae* (imposed by lawful authority) or *latae sententiae* (incurred automatically).⁴⁹ These provisions have the purpose of protecting the faithful from an authority who would attempt to impose a canonical penalty apart from the ways foreseen in the law. Therefore, in the context of our larger discussion of the non-penal disciplinary procedure, such a procedure could never culminate in the imposition of a penal sanction. Only a judicial or administrative (extrajudicial) procedure can culminate in the imposition or declaration of a penal sanction.⁵⁰ This means that the non-penal disciplinary procedure can culminate only in some sort of punishment or correction that is *not* a penal sanction.⁵¹ Furthermore, it would not be appropriate for a

⁴⁶ Cf. c. 221 §3.

⁴⁷ The medicinal penalties outlined in cc. 1331-1333 are excommunication, interdict, and suspension.

⁴⁸ Paragraph 1 of c. 1336 lists expiatory penalties: “1°, a prohibition or an order concerning residence in a certain place or territory; 2°, privation of a power, office, function, right, privilege, faculty, favour, title, or insignia, even merely honorary; 3°, a prohibition against exercising those things listed under n. 2, or a prohibition against exercising them in a certain place or outside a certain place...; 4°, a penal transfer to another office; 5°, dismissal from the clerical state.” Canon 1314 also refers to penal remedies and penances but these are not strictly speaking penalties.

⁴⁹ Cf. c. 1314.

⁵⁰ As already noted, penalties can also be applied *latae sententiae* but this does not involve a procedure, per se. *Latae sententiae* penalties are further classified as either undeclared or declared. A *latae sententiae* penalty is undeclared when the offence is occult, or at least unknown to lawful authority. A *latae sententiae* penalty is declared when legitimate authority declares in a public document that the delict has been committed by certain persons and therefore, *ipso iure*, they are under the penalty the law attaches to the offence.

⁵¹ It stands to reason that a religious superior may not impose a punishment identical to a penal sanction but called by a different name. However, religious superiors may lawfully impose certain restrictions, obligations, or prohibitions that are identical to certain penal sanctions for a non-penal reason, such as, for instance, a superior who forbids a priest from celebrating the Eucharist because he has dementia and can no longer do so in an edifying way (cf. c. 1044 §2, 2°), or a superior who restricts the residence of a member for the member's personal safety or health.

superior to impose a penal sanction outside of a penal procedure even if, in a spirit of contrition or for some other reason, a religious who committed some type of non-penal misconduct voluntarily submitted to one. While such contrition on the part of the member may be laudable, a superior might cause scandal, or at least compromise his or her own credibility in the eyes of other members, if he or she were seen to be imposing sanctions which all members know are beyond his or her authority. The punishment must always fit the crime, and to punish non-penal misconduct with a penal sanction would seem, by definition, excessive.

Furthermore, aware of the superior's duties to protect the rights of members, and especially those rights that are most fundamental, we consider it beyond the authority of any religious superior to impose some punishment perpetually as a result of a non-penal disciplinary procedure. Canon 1342 §2 states: "Perpetual penalties cannot be imposed or declared by decree." While the context of this canon is clearly the application of penal sanctions, the same principle should apply to non-penal sanctions, since the non-penal disciplinary procedure that we are considering is clearly more closely related to an administrative procedure than a judicial procedure.

5 — When to Use the Non-Penal Disciplinary Procedure

As we have already discussed above, it would be contrary to the law to address the apparent commission of a delict in any way other than by means of a penal judicial or administrative procedure, observing the other relevant canonical norms. Certainly, a religious superior who is not an ordinary cannot use a non-penal disciplinary procedure to address misconduct that is penal in nature, since the penal procedure is beyond his or her competence. At all times, cases of misconduct that involve the violation of penal law must be treated in accordance with the relevant norms for that offence, such as those found in Book VI and Book VII of the *CIC* and in the CDF's Revised Norms on Dealing with Clerical Sex Abuse of Minors and Other Grave Offences. In every case where religious superiors who are not ordinaries become aware of the possible commission of a delict by one of their subjects, they must refer the matter to the appropriate authority. This is without prejudice to the right of religious superiors to order a member, in accordance with the law, to do or not to do certain actions, regardless of what misconduct or criminal behaviour they believe may have taken place.⁵²

⁵² The fact that an accusation against a member may become the object of a penal procedure or a non-penal disciplinary procedure in no way diminishes a superior's authority to give an

The non-penal disciplinary procedure is intended for violations of proper, ecclesiastical or divine law that are not delicts. Included in the concept of “proper law” would also be things such as province policies or codes of conduct which apply to members of the institute within a certain territory. Although the non-penal disciplinary procedure may not be necessary in its full form in cases where the accused accepts responsibility for his or her misconduct, it will be especially helpful in cases when the accused denies the accusation, when the proofs supporting the accusation are weak or absent, when the accused presents compelling counter-proofs, or when the accuser lacks credibility.⁵³ The non-penal disciplinary procedure would likely have a formal rigour which some would find distasteful or out-of-place in religious life, where a more familial atmosphere often prevails. But when a serious accusation of misconduct is levelled and the truth of the matter is not readily apparent, a reliable method for ascertaining the truth which does not betray a bias either for the accuser or the accused will be helpful to assure all parties that the accusation is taken seriously and examined fairly, in accordance with the church law and ecclesiastical jurisprudence. Provided the procedure is carried out in a spirit of canonical equity, which is to say mercy, there is no reason to consider a structured procedure as less Christian than a spontaneous one.

6 — *When Is a Protective Measure Unjust?*

A major superior must always make clear for a member who has been found guilty of misconduct when a measure is a protective measure and when it is a punishment. The two serve different purposes: the former, to protect individuals or groups; the latter, to repair scandal, restore justice, and/or reform the member. A protective measure must always correspond directly and precisely to the misconduct the member is known to have committed. The major superior must be able to justify the application of a protective measure by means of a logical extrapolation from the misconduct that is known to have occurred. It would be profoundly unjust for a superior to

order under obedience to that member regarding future behavior, provided the superior gives the order in accordance with the law and the object of the order is subject to his or her authority. Such an order may have a preventative value or serve to clarify for the member that certain behavior he or she believed was permissible is in fact forbidden.

⁵³ See J.A. RENKEN, *Penal Law: A Realization of the Misericordiae vultus Ecclesiae*, seminar presentation at the 50th Annual Convention of the Canadian Canon Law Society, Tuesday, 27 October 2015, 34 of manuscript.

apply a protective measure that was significantly more extensive than the misconduct. For instance, it would be unjust to limit a member's sacramental ministry after a proven incident of misappropriation of funds. An inappropriate or dishonest use of financial resources is no predictor of the member's potential for harmful or abusive sacramental ministry. Likewise, it would be unjust to forbid a male member from all contact with women after an incident where the member was found to ask women inappropriate questions in a counselling context. Posing inappropriate questions to women in a private setting is no predictor that the male member poses a general threat to all women in any possible circumstances, including public settings. In the first example, it would be appropriate to curtail or to supervise carefully the member's access to funds. In the second case, it would be appropriate to require the member to desist from meeting with women in private or to receive further training. In all cases, major superiors must be able to justify their application of a protective measure by basing their decision on sound reasoning and established facts.

7 — Principles That Should Guide All Non-penal Disciplinary Procedures

The following principles should govern all non-penal procedures.

1. Discipline cases which involve only some private good⁵⁴ and in which the accused admits his or her fault are typically simple to resolve and may not require a highly developed procedure. However, cases in which the accused denies responsibility and/or which touch upon the public good⁵⁵ are considerably more complex and need to be treated with greater care and precision. The public good is engaged any time someone commits a form of misconduct with another person that would not appear to be exclusive to that particular victim⁵⁶ or to be the result of certain extreme circumstances that are unlikely

⁵⁴ A form of misconduct that involves mostly a private good might be a religious who gambles regularly at a casino or who routinely accesses adult pornography. Such a religious may be harming himself or herself and/or the good reputation of the institute, but he or she poses no significant danger to the faithful or the public at large.

⁵⁵ For example, a religious who has repeatedly driven a vehicle under the influence of alcohol poses a danger to anyone on the street and thereby endangers the public good.

⁵⁶ For example, a religious who is accused of inappropriate hugging and touching during spiritual direction might presumably be inclined toward such behavior with all (or at least a certain profile of) spiritual directees and could be considered a threat to the public good.

to be replicated.⁵⁷ Major superiors must always bear in mind that the task of administering discipline is not complete simply because the victim is satisfied. The danger to the public good in the present⁵⁸ and in the future⁵⁹ must always be assessed,⁶⁰ and appropriate action must be taken.

2. When the accusation is contested, major superiors must diligently protect the rights of all parties and treat them with comparable care and concern. It is as equally unjust to favour the accuser as it is to favour the accused, or to put the good of the institute ahead of the public good. In no way is it in accordance with mercy to deal gently with someone who is known to have committed misconduct, if to do so violates the rights of the victim or endangers the future safety of others. If the major superior is uncertain of his or her ability to follow the procedure impartially, he or she must delegate a substitute to follow the procedure and decide the case.
3. It is potentially unjust for the major superior to wait until the commission of some misconduct to publish or to establish protocols for disciplinary cases. Such protocols or procedures should be known in advance to all people for whom they may be relevant, so there can be no doubt that the same procedures will apply equally to everyone concerned and that they were not generated for the sake of “this particular case” or “this particular religious.”
4. Religious superiors can and must use discretionary authority. Since non-penal misconduct cases are potentially very delicate and complex, it is necessary that the superior’s use of discretionary authority be carefully structured, so as to increase the likelihood that rights will be safeguarded and the law upheld.
5. Superiors must know and respect the limits of their authority, and they must follow the established procedures assiduously. They must be able to justify all their decisions by means of recourse to the established procedures, analogy with other relevant law, and/or sound reasoning based on established facts. The superior may not base the decision

⁵⁷ For example, a mature religious who had never before engaged in inappropriate hugging and touching but who did so while taking a medication that has the potential side effect of reducing inhibitions might be presumed to be of no future risk to anyone, provided he or she stops taking the medication.

⁵⁸ For example, public scandal in relation to what happened.

⁵⁹ For example, a possible risk to new victims.

⁶⁰ Preferably, with the assistance of experts.

upon private information or invoke other justifications for a decision besides these criteria.

6. While respecting anything that is necessarily confidential, as well as each party's right to good reputation (c. 220), the major superior must endeavour to follow the procedure with as much transparency and openness as possible. This means allowing the accused and the accuser the right to counsel or even the company of a trusted friend who can accompany them throughout the procedure. It also means that the major superior engages the help of experts in a meaningful way and never fails to provide the reasons for his or her decisions. It also means that the faithful or the public at large be informed about the outcome of the procedure, to the extent the particulars of the case demand.
7. Superiors may never use a non-penal disciplinary procedure to address penal matters, nor may they impose a penal sanction as the result of such a procedure. Delicts must always be addressed in accordance with the relevant canons of *Book VI* and *Book VII*.

Conclusion

In conclusion, sound and well-developed disciplinary procedures are neither antithetical to the Gospel nor to the spirit of religious life.⁶¹ The salvation of souls is the supreme law, but those in authority must care for the souls of all people equally: the accuser, the accused, other involved parties and, often, the general public. This is almost never a simple or straightforward task. Especially in complex cases, where different accounts of what happened are proposed, where rights conflict, and where laws are silent, rarely will the spontaneous inspirations of those in authority be more effective at saving souls, serving justice and testifying to Gospel values, than will be the sound procedures inspired by the law and praxis of the Church, which are themselves the fruit of centuries of experience and the collective work of countless holy souls.

⁶¹ In fact, disciplinary procedures are acts of charity towards members whenever they help those who have committed misconduct to face difficult truths about themselves and/or to avoid the same pitfalls in the future.

Appendix

Disciplinary Procedure for Non-Penal Misconduct⁶²

1. The major superior will appoint a delegate⁶³ to handle all allegations of non-penal misconduct against members within her jurisdiction.⁶⁴
2. The term “non-penal misconduct” refers to a culpable violation of divine law, ecclesiastical law, the proper law of the entire institute or the code of conduct of this particular jurisdiction, that is not also classified as a delict according to church law.⁶⁵
3. This procedure and the mandate of the delegate is exclusively for cases of non-penal misconduct. If evidence of a penal offence emerges at any point, the case will be referred to the appropriate official for those cases. If evidence of a violation of civil law emerges, which carries with it a requirement to report the allegation to authorities, whoever has knowledge of such an offence will meet his or her civil obligations immediately.
4. The delegate will be appointed for a five-year term, renewable. The delegate may be anyone who has the necessary training and experience.
5. Alleged misconduct by a lay collaborator will be handled by the relevant work supervisor or local superior, notwithstanding the right of the work supervisor or local superior to petition the major superior to have the delegate assess the case on his or her behalf.
6. Any person who alleges misconduct by a member of the institute may present his or her accusation to the delegate.⁶⁶ If the allegation is outside the delegate’s assigned responsibilities by reason of person, territory or matter, the delegate will refer the case to the appropriate official.

⁶² An effective procedure for addressing non-penal misconduct could take many forms. This protocol is offered as one possibility.

⁶³ In reality, the major superior may choose to have a single delegate for penal and non-penal misconduct, together with a common set of procedures, but for the sake of clarity our example will focus exclusively on procedures for allegations of non-penal misconduct.

⁶⁴ In this procedure, we will use the example of an institute of women, so all the relevant pronouns will be feminine.

⁶⁵ Those deciding cases in accordance with this procedure will apply the canons regarding mitigating, aggravating and exculpating factors (cc. 1321-1330) *mutatis mutandis*.

⁶⁶ The one leveling an accusation may himself or herself have been the direct victim of the misconduct, or simply have been a witness to misconduct which did not have a specific victim but which was nonetheless scandalous or dangerous to people generally.

7. Any member of the institute who receives a report of misconduct by another member will inform the delegate. Persons other than the victim or a first-hand witness to the alleged misconduct may also present accusations to the delegate. Whenever possible, such reporters will provide the delegate with the necessary information to contact the victim or any first-hand witness, even if that person is not a Catholic or currently resident in the territory.
8. If at any time in the course of the procedure the delegate forms the opinion that the accused's ministry or movements should be limited until the completion of the procedure, the delegate will immediately inform the major superior and explain the reasons. The major superior will decide what, if any, protective measures will be imposed on the member. All such protective measures automatically cease at the conclusion of the procedure.
9. The delegate will begin by attempting to gather any and all relevant proofs of the alleged misconduct. Such proofs may take the form of testimony by the alleged victim, or those who personally witnessed the misconduct, or of someone who heard the accused speak of her misconduct. Any other proofs that are informative will also be gathered.
10. If the accusation seems unlikely, because of inconsistencies in the testimony, or a lack of credibility on the part of the accuser, the delegate may seek character witnesses in regards to the person or persons leveling the accusation.
11. Before the delegate presents the accusation to the accused, the delegate will remind the accused of her rights. Specifically, the accused has the right to privacy and to a good reputation and is under no obligation to admit to any wrongdoing (cf. c. 220). Secondly, the accused is entitled to an advisor. The advisor may be a canonist, a civil lawyer or simply a trusted friend. The advisor need not be a member of the institute. If there is a question of paying for the services of the advisor, the major superior must approve the expense. (Although the accused has the right to an advisor, the major superior has the right to refuse a particular advisor whose services are more expensive than the institute can bear.) As noted above, depending on the circumstances, the major superior may decide to impose certain protective measures (e.g., temporary removal from ministry, limitations on movement, etc.). Such measures are never to be regarded as a presumption that the member is guilty of the accusation.
12. Once the accused has been informed of her rights and an advisor is found (should one be desired), the delegate will share with the accused

the nature of the accusation and whatever proofs have been gathered, including the name of the accuser(s). The accused has the right not to respond to the accusation or to respond in whatever way she chooses. The accused may refuse to answer any of the questions put forward by the delegate. The accused will be invited to offer any counter-proofs or to recommend that certain persons be interviewed whose testimony may help to exonerate her.

13. If, after being informed of her rights, the accused spontaneously admits her guilt, the case will be referred directly to the major superior for a decision regarding how to proceed. The major superior may decide on some punishment or other means to “repair the scandal, restore justice, [and] reform the offender.”⁶⁷ In certain circumstances, the major superior may appoint someone to mediate a resolution between the accused and the accuser(s), although neither party may be forced into such a process against his or her will. If the major superior decides that the case warrants the imposition of some punishment, she will weigh that matter with the assistance of at least one canon lawyer and one other expert in this or comparable procedures. These experts need not be members of the institute, but wherever possible, at least one should be. As much as possible, these experts should be unbiased towards the persons involved and have no personal interest in the matter under consideration. If the major superior herself feels she cannot decide the case impartially, she may appoint a substitute to decide the case in her place.
14. At the first available opportunity, the delegate will inform the accused and accuser not to have any contact with each other, or with members of their family or other close associates, by any means of communication whatsoever, until such time as the procedure is complete. If some measure of contact is unavoidable (e.g., because they live or work in close proximity to each other) or happens accidentally, any discussion of the case is to be avoided by all parties.
15. The delegate is to observe strict confidentiality regarding the procedure, and any evidence gathered as part of it, in perpetuity, unless the major superior instructs the delegate otherwise. When interviewing possible witnesses, whenever possible, the questions should be such as to avoid revealing any defamatory accusations. Revealing the precise accusation to a possible witness must be done only with great circumspection, so as to avoid leading a witness to give testimony he or she would not otherwise have given.

⁶⁷ Cf. c. 1341.

16. The delegate will continue to gather proofs until such time as he or she believes the case is sufficiently instructed or that there is no further hope of gathering useful evidence.
17. Once the gathering of proofs is complete, the delegate will present the proofs to the major superior along with the delegate's carefully considered recommendation for how the case should be resolved. The major superior will decide the case with the assistance of two experts as described in n. 13. The major superior will decide if the accused is innocent or guilty. A verdict of "unproven," or a procedure which is left unresolved for a protracted period of time, is not permitted, lest the lingering accusation result in harm to the accused's good reputation (cf. c. 220). The standard for deciding upon guilt or innocence will be moral certainty.
18. Depending on circumstances, after the delegate has shared the proofs and his or her recommendation, the major superior may decide to meet with the accused, or the accuser, or both. The major superior may meet with the accused and the accuser either separately or together. In cases that may warrant the imposition of some punishment or protective measure, the major superior will inform the parties in advance that even if they were to reach some amicable resolution between themselves, the major superior may still determine that it is necessary to impose a punishment or protective measure. The major superior will not render any final decision until she has consulted the two experts referred to in n. 13.
19. Once the major superior has made a decision, a written copy of the decision, with supporting reasons given in summary form, will be sent to both the accused and accuser(s). All other documentation related to the procedure will be kept in the relevant confidential archive. In addition to the copy sent directly to the accused, a copy of the decision will be retained in the accused's personnel file.
20. The accused and the accuser have the right to speak directly to the major superior, but normally the major superior will only receive the accused or the accuser after having considered the proofs and the recommendation of the delegate.
21. When the major superior renders a decision that the accused is innocent in regards to the accusation, she will prepare a written document that clearly exonerates the accused. The document will be published in a manner commensurate with the publicity attached to the accusation.

22. Even when the major superior renders a decision that the member is innocent in regards to the accusation, depending on circumstances, she may still employ the following, albeit confidentially:
 - If there is a suspicion that, although it was not proven, the misconduct in question may have occurred, a penal precept (cf. c. 1319) may be imposed on the accused which henceforth circumscribes the suspected behavior and attaches to it a specific penalty.⁶⁸
 - If there is a suspicion that, although it was not proven, the misconduct may have occurred, the major superior may issue a caution to the member.
23. When the major superior renders a decision that the accused is guilty of the accusation leveled against her, the major superior may employ any of the following options:
 - A formal letter of rebuke to the member.
 - An appropriate external forum penance to be performed by the member.
 - A punishment, spiritual or temporal, which is within the authority of the major superior to impose. The imposition of any punishment will be considered with the experts mentioned in n. 13. No form of therapy or counseling can ever be imposed as a punishment.
 - Having decided upon a certain punishment in accordance with the previous point, the major superior may then suspend the execution of the punishment for as long as the guilty party observes certain requirements.
24. It may happen that the nature of the misconduct, which became certain as a result of the procedure, leads the major superior to conclude that some sort of permanent protective measure is necessary, such as, a permanent restriction on the member's movements or ministry. Such a measure, although it entails imposing limits on the member's exercise of her rights, is not a punishment, but rather a measure meant to protect the faithful, the public, or the member herself from possible harm. In any case, the imposition of such measures should be weighed very carefully and decided upon with the help of the experts mentioned in n. 13. Once imposed, the major superior will reevaluate the usefulness of the protective measure(s) at regular intervals, not to exceed a period longer than every three years.⁶⁹

⁶⁸ This is the power of the competent religious superior as seen in cc. 618 and 697, 2°.

⁶⁹ Even though a member may be found not culpable of committing some act of misconduct, provided the commission of the unlawful act(s) by the accused is certain, the major superior may still decide to impose protective measures.

25. At the conclusion of any non-penal disciplinary procedure, both the accuser(s) and accused will have explained to them the possible means for them to seek recourse whether to the supreme moderator of the institute, the CICLSAL or the Apostolic Signatura.
26. Unless a compelling reason suggests otherwise, the delegate will not consider accusations of misconduct older than three years.

THE CANONICAL STATUS OF AN ORDINARY EMERITUS

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SUMMARY — The retirement of Msgr Jeffrey Steenson in November 2015 presents the first instance of an ordinary emeritus of a personal Ordinariate. While the canonical status of an ordinary emeritus for the most part parallels that of a bishop emeritus, in certain respects there are notable differences grounded in sacramental character. Of particular significance is the ordinary emeritus' continued incardination in his previous (arch)diocese, and his ongoing membership and participation in episcopal conference(s). A consistent praxis has not yet emerged, as a survey of recent correspondence shows.

RÉSUMÉ — Suite à sa retraite en novembre 2015, Mgr Jeffrey Steenson est devenu le premier ordinaire émérite d'un ordinariat personnel. Bien que le statut canonique d'un ordinaire émérite corresponde généralement à celui d'un évêque émérite, il existe à certains égards des différences notables fondées sur le caractère sacramentel. Le fait que l'ordinaire émérite soit toujours incardiné dans son précédent (archi)diocèse, qu'il soit encore membre de la (des) conférence(s) épiscopale(s) et qu'il puisse y participer revêt une importance particulière. Un aperçu de récentes correspondances a démontré qu'une praxis cohérente n'existe pas encore.

1. The *Code of Canon Law* promulgated with the apostolic constitution *Sacrae disciplinae leges* on 25 January 1983, responding to the teaching of the Second Vatican Council,¹ introduced into the legal system of the

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¹ *Christus Dominus*, art. 21 deals with the resignation from pastoral ministry, and prescribes: "Since the pastoral office of bishops is so important and weighty, diocesan bishops and others regarded in law as their equals, who have become less capable of fulfilling their duties properly because of the increasing burden of age or some other serious reason, are earnestly requested to offer their resignation from office either at their own initiative or upon the invitation of the competent authority. If the competent authority should accept the

Church the status of the “emeritus.”² The term was first used and described by Prospero Lambertini, who later became Benedict XIV, while he was Undersecretary of the Congregation of the Council, in his *Institutiones ecclesiasticae*:³ he stated that the status of “emeritus” has both religious and secular roots.

2. The current Code of Canon Law refers to the status of “emeritus” in four canons:

- Can. 185: *The title of **emeritus** can be conferred upon a person who loses an office by reason of age or of resignation which has been accepted.*
- Can. 402 §1: *A bishop whose resignation from office has been accepted retains the title of **emeritus** of his diocese and can retain a place of residence in that diocese if he so desires, unless in certain cases the Apostolic See provides otherwise because of special circumstances.*
- Can. 443 §2. *Other titular bishops, **even retired ones**, living in the territory can be called to particular councils; they also have the right of a deliberative vote.*
- Can. 707 §1: *A **retired** religious bishop can choose a place of residence even outside the houses of his institute, unless the Apostolic See has provided otherwise.*

resignation, it will make provision both for the suitable support of those who have resigned and for special rights to be accorded them.” VATICAN COUNCIL II, *Christus Dominus*, 28 October 1965, in AAS, 58 (1966), 683.

² The current Code established the title of “emeritus” in can. 185, but does not determine its application for those who have left their office. Can. 402 §1, however, provides that “A bishop whose resignation from office has been accepted retains the title of ‘emeritus’ of his diocese and can retain a place of residence in that diocese if he so desires, unless in certain cases the Apostolic See provides otherwise because of special circumstances.”

³ Prospero LAMBERTINI, *Institutiones ecclesiasticae*, Rome, Typis Sacrae Congregationis de Propaganda Fide, 1747; see particularly n. 107 (p. 580). The religious roots, Lambertini noted, were found in the Mosaic law: “And the LORD spake unto Moses, saying, This is it that belongeth unto the Levites: from twenty and five years old and upward they shall go in to wait upon the service of the tabernacle of the congregation; And from the age of fifty years they shall cease waiting upon the service thereof, and shall serve no more: But shall minister with their brethren in the tabernacle of the congregation, to keep the charge, and shall do no service” (Num 8.23-26). The secular roots are found in Roman Law, particularly in the *Digest* of Justinian: cf. D. 49, XVIII *De veteranis*, 1-3, 5. Normally Roman soldiers became “emeritus” after twenty years of service. The Sacred Congregation of the Council occasionally granted the *indultum iubilationis* as a sign of special favour, on account of special service to the Church, from the seventeenth century onward: this is the principal canonical source of the figure of the “emeritus.”

3. The status of “Ordinary of a personal Ordinariate,”⁴ created by the apostolic constitution *Anglicanorum coetibus* (4 November 2009) of Benedict XVI, is a new one and has come into existence since the promulgation of the most recent *Code of Canon Law*. Since a Personal Ordinariate is “equalled” (*aequatur*)⁵ to a diocese, the ordinary is likewise legally equivalent to a diocesan bishop in all matters which do not require episcopal consecration. An “Ordinary emeritus” (of which only one exists) would thus be likened to a diocesan bishop *emeritus* in all matters which do not require episcopal consecration. Thus:

3.1 The Ordinary of a Personal Ordinariate, on the day on which he received official notification that his resignation has been accepted by the Roman Pontiff, loses all jurisdiction over the Personal Ordinariate and the office of Ordinary becomes vacant: the one resigning loses all rights and is freed from the relative obligations.

3.2 He may acquire the title “Ordinary emeritus” of the Personal Ordinariate of which he had formerly been Ordinary (*cf. can. 402 §1*); just as a retired diocesan bishop is not transferred to a titular see, but continues to have a connection with the diocese he had served, so the retired Ordinary would retain “a certain bond of spiritual affection”⁶ with the Personal Ordinariate he had served. The Ordinary, however, would retain his incardination in whatever diocese or religious

⁴ BENEDICT XVI, apostolic constitution *Anglicanorum coetibus*, 4 November 2009, n. IV. in AAS, 101 (2009), 987.

⁵ *Anglicanorum coetibus*, n. I. §3, in AAS, 101 (2009), 987. In the English translation, the apostolic constitution states that these ordinariates are “juridically comparable to a diocese” and refers, in a footnote, to the same expression used in the apostolic constitution *Spirituali militum curae*, which introduced the structure of the military Ordinariate after the promulgation of the 1983 Code. This would seem, therefore, to propose some sort of equivalence between these two types of personal jurisdiction. The Latin texts, however, of both documents show that the original verbs used are not the same. In the case of the personal ordinariates, these juridically *aequantur* to a diocese, whereas military ordinariates juridically *assimilantur* to a diocese. The first verb would seem to be stronger than the second: “to be equal to” would appear to be a greater identity than “to be similar to” something. Thus, the Latin text of the constitution would seem to suggest that there is an equality between a diocese and a personal Ordinariate. A look at Xavier OCHOA, *Index Verborum ac Locutionum Codicis Iuris Canonici*, Città del Vaticano: Libreria Editrice Lateranense, 1984, shows that this verb is not used anywhere in the 1983 Code, so it is not possible to look in comparable places for clarity of meaning. In the CCEO, it appears in can. 955 § 3: *Si numerus suffragiorum non aequatur numero eligentium, nihil est actum*: “If the number of votes **does not equal** the number of electors, the voting is without effect” (emphasis added).

⁶ Cf. SACRED CONGREGATION FOR BISHOPS, Circular Letter to Papal Representatives *De titulo tribuendo Episcopis renuntiantibus*, prot. n. 335/67, 7 November 1970, in *Communicationes*, 10 (1978), 18.

institute he had previously been incardinated: he would not become “transferred” to the Personal Ordinariate, and would not be incardinated in the Personal Ordinariate, unless he had been so incardinated before his appointment as Ordinary.⁷

- 3.3 He may retain, if he so desires, a residence in the same territory, unless, in certain circumstances, the Apostolic See determines otherwise (*cf.* can. 402 §1). Because of the vast extent of the territory of the Personal Ordinariate of the Chair of Saint Peter, this provision hardly seems problematic.
- 3.4 The Episcopal Conference must take care to provide for an adequate and dignified support for the retired Ordinary, taking into account that the Personal Ordinariate which he had served would have the primary obligation (*cf.* can. 402 §2).
- 3.5 The funeral of the Ordinary *emeritus* should take place in the principal church of the Ordinariate, unless he has chosen another (can. 1178). Although this is less clear, it would appear that he has a right to be buried in the principal church of the Ordinariate.⁸
4. The Ordinary participates in Episcopal Conferences as one “equivalent to a diocesan bishop in law.”⁹ Whether the Ordinary *emeritus* can participate

⁷ Incardination is only in an entity which has the right to incardinate (can. 265); it can end through excardination and subsequent incardination in a new body, or through loss of the clerical state. Excarnation does not take effect unless incardination in another particular church has been obtained (can. 267 §2). Appointment to an office in another particular church does not entail incardination in that church; the previous incardination would remain until such time as the former particular church excardinated the cleric. Thus, a cleric who serves in another diocese with the appropriate permissions remains incardinated in his original diocese even though he is not resident and does not exercise ministry there (can. 271). A priest who is a member of a religious institute is incardinated in that institute; should he be chosen as bishop, he would serve as bishop but would remain a member of the institute (can. 705). This would obviously be even more the case with an Ordinary—he would remain incardinated in the particular church of his previous service while legitimately serving in the Personal Ordinariate; upon his resignation being accepted, his previous incardination would remain. He would only be incardinated in the Personal Ordinariate if he has been so incardinated prior to his appointment as Ordinary.

⁸ Can. 1242 prescribes: “Bodies are not to be buried in churches unless it is a question of burying in their own church the Roman Pontiff, cardinals, or diocesan bishops, **including retired ones**” (emphasis added). This appears to be in consideration of their service to the particular church rather than in virtue of episcopal consecration (thus the addition of cardinals, who will not necessarily have been diocesan bishops, or even bishops, as a special category).

⁹ *Code of Canon Law*, can. 450 §1; Complementary Norms for the Apostolic Constitution *Anglicanorum coetibus*, Art. 2 §2, in AAS, 101 (2009), 991.

in the Episcopal Conference would depend on the statutes of the relevant Episcopal Conference. Although the statutes of Episcopal Conferences do not foresee bishops *emeriti* participating with a deliberative vote,¹⁰ the statutes may permit and even encourage them to be involved in some of the meetings and in committees dealing with matters concerning which the bishops were particularly knowledgeable.¹¹ If this is accorded to diocesan bishops *emeriti*, it would also apply to Ordinaries *emeriti*, who had served in a similar capacity over the Personal Ordinariate. This would be even more so if the Ordinary *emeritus* continued to reside within the territory of the same Episcopal Conference of which he had been a member prior to the acceptance of his resignation.

See also CCCB Statutes, Art. 3. 1°-2°: while a Personal Ordinary would not precisely qualify as the equivalent of one of the “diocesan Bishops of Canada” (1°), he would certainly come under the heading of “those equivalent to them in law with jurisdiction in Canada” (2°). The latter clause clearly provides for bishops of Eastern Catholic Churches whose jurisdiction includes territory outside of Canada. CANADIAN CONFERENCE OF CATHOLIC BISHOPS, *Statutes of the Canadian Conference of Catholic Bishops*, 1 December 2008, at: <http://www.cccb.ca/site/eng/media-room/official-texts/decrees/2625-statutes-of-the-canadian-conference-of-catholic-bishops-cccb> (26 June 2017).

Art. 2. a) 3) of the USCCB Statutes includes Ordinaries under the heading of “those equivalent to diocesan and eparchial bishops in law.” While Art. 2. a) 1) lists as members of the Episcopal Conference “Bishops of the Latin and Eastern Catholic Churches who are diocesan or eparchial bishops, coadjutors, or auxiliaries in the service of the particular Churches in the United States or the U.S. Virgin Islands and who belong to no other episcopal conference,” section 3) does not contain the same provision that the member “belong to no other episcopal conference,” enabling the Ordinary of the Personal Ordinariate of the Chair of Saint Peter to belong to both the Episcopal Conferences of the United States of America and Canada. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *USCCB Statutes, Bylaws, Committee Handbook, and Regulations Regarding Statements and Publications*, Washington, DC, USCCB Publications, 2000, 1-2.

¹⁰ Cf. Code of Canon Law, can. 454 §1; JOHN PAUL II, apostolic letter *motu proprio Apostolos suos*, 21 May 1998, n. 17, in *AAS*, (1998), 652-653: “In the plenary meetings of the Episcopal Conference, the deliberative vote belongs to diocesan Bishops and to those who are equivalent to them in law, as well as to coadjutor Bishops; and this by reason of the law itself. The statutes of the Conference cannot provide otherwise. However, it is appropriate that the statutes of Episcopal Conferences allow for the presence of Bishops *emeriti*, and that they have a consultative vote. Particular care should be taken to enable them to take part in some study Commissions, when these deal with issues in which a Bishop *emeritus* is particularly competent.” The CCCB Statutes, Art. 5 §2, however, states that “Bishops *emeriti* have a consultative voice, without prejudice to the provisions of article 3.” This is the only explicit mention of *emeriti* in the CCCB Statutes.

¹¹ “Bishops *emeriti* have a consultative voice but not a deliberative vote in the Conference. They are encouraged and invited to attend all sessions of the Plenary Assembly and to make available to the Conference their special wisdom and experience by speaking to issues at hand” (USCCB, Statutes, Art. 2. b).

5. On the other hand, if the Ordinary *emeritus* was not a consecrated bishop, he would not be a member of the College of Bishops (*cf.* can. 336), would not have any right to attend an ecumenical council with a deliberative vote (*cf.* can. 339), be elected a member of the Synod of Bishops (*cf.* can. 366 §1), or participate in the exercise of collegial episcopal power within the limits of the law (*cf.* can. 337 §2). All of these activities would be based on the reception of episcopal consecration and the subsequent possession of episcopal power of orders.

5.1 The 1998 apostolic letter *motu proprio Apostolos suos* of John Paul II made a clear distinction between the joint pastoral functions undertaken by bishops in a particular territory, such as those under the supervision of an Episcopal Conference, in which a non-episcopal Ordinary may be included, and those which are proper to the actions of the order of bishops as such, in which he would not: “When the Bishops of a territory jointly exercise certain pastoral functions for the good of their faithful, such joint exercise of the episcopal ministry is a concrete application of collegial spirit (*affectus collegialis*), which ‘is the soul of the collaboration between the Bishops at the regional, national and international levels.’ Nonetheless, this territorially based exercise of the episcopal ministry never takes on the collegial nature proper to the actions of the order of Bishops as such, which alone holds the supreme power over the whole Church. In fact, the relationship between individual Bishops and the College of Bishops is quite different from their relationship to the bodies set up for the above-mentioned joint exercise of certain pastoral tasks.”¹² This distinction would also carry over to the difference between an Ordinary *emeritus*, as well as any others included in the category “equivalent in law to a diocesan bishop” but who have not received episcopal consecration and who have had their resignations accepted by the competent authority, and a Bishop *emeritus*.

5.2 A series of letters and responses from the Congregation for the Doctrine of the Faith, the dicastery of the Roman Curia principally responsible for Personal Ordinariates, has failed to make the status of an ordinary *emeritus* clearer.

5.2.1 In a letter of 12 December 2011 (Prot. N. 204/11-37441), William, Cardinal Levada, Prefect of the Congregation for the Doctrine of the Faith wrote to Timothy, Cardinal Dolan about

¹² JOHN PAUL II, apostolic letter *motu proprio Apostolos suos*, 21 May 1998, n. 12, in AAS, (1998), 649.

the impending erection of the Personal Ordinariate of the Chair of Saint Peter.¹³ The letter notes that, “[a]lthough I had the opportunity to make reference to this matter during the recent *ad limina* visit of the Bishops of New York, I draw your attention to n. 6 of the Decree of Erection which notes that the Ordinary is by right a member of the United States Conference of Catholic Bishops with a deliberative vote.”¹⁴

5.2.2 Monsignor Jeffrey N. Steenson, first Ordinary of the Personal Ordinariate of the Chair of Saint Peter, was informed by a letter dated 24 November 2015 from the Prefect of the Congregation for the Doctrine of the Faith, Gerhard, Cardinal Müller, (Prot. N. 204/11-52972) that his resignation as ordinary had been accepted by the Roman Pontiff, and that he would continue as administrator of the Ordinariate until his successor

¹³ Unpublished letter. The Ordinariate was canonically erected on the following 1 January [2012]; a copy of the Decree of Erection of the Personal Ordinariate of the Chair of Saint Peter was attached to the 12 December letter, with a notice that the text was under embargo.

¹⁴ The letter continues, “This Congregation has also consulted the Congregation for Bishops and the Congregation for Divine Worship concerning the application of the directives given in the *Motu Proprio Pontificalia insignia* of Pope Paul VI (1968) to the Ordinariates. The Ordinary of the Personal Ordinariate of the Chair of St. Peter is comparable to the figure of an abbot in that, though not a bishop, he exercises ordinary jurisdiction. Therefore the Ordinary would have the right to use the miter and crosier, as well as the pectoral cross and ring. If it would be helpful, you may wish to communicate this information to the other members of the Conference of Bishops.”

The apostolic letter *motu proprio Pontificalia insignia* (21 June 1968, AAS, 60 [1968], 374-377) bears the subtitle “on the approved usage of pontifical insignia.” The *motu proprio* quotes from the constitution on the Sacred Liturgy of the Second Vatican Council, that “it is fitting that the use of pontificals be reserved to those ecclesiastical persons who have episcopal rank or some particular jurisdiction.” (constitution *Sacrosanctum Concilium*, n. 130, in AAS, 56 [1964], 133). “To put into effect the will of the Council,” n. I of the *motu proprio* states: “According to the provisions of article 130 of the Constitution on the Sacred Liturgy, We order that, besides bishops, only the following prelates, endowed with real jurisdiction though lacking episcopal dignity, may henceforth use pontifical insignia: ... b) Abbots and Prelates possessing jurisdiction over a territory not subject to any diocese (*cfr.* CIC can. 319 § 1; can. 325); ...” N. III of the *motu proprio* continues: “The Prelates mentioned in nn. 1 and 2, enjoy the aforesaid rights only within their own territory and during their tenure of office.” This provision was extended to former Anglican bishops by Art. 11 §4 of the complementary norms to *Anglicanorum coetibus*: “A former Anglican Bishop who belongs to the Ordinariate and who has not been ordained as a bishop in the Catholic Church, may request permission from the Holy See to use the insignia of the episcopal office.” No statement is made about the liturgical dress of a non-episcopally ordained ordinary who is not a former Anglican Bishop. Note that in all of these documents, the subject is liturgical dress, and *not* canonical status.

took possession of the Personal Ordinariate. This occurred on 2 February 2016, when Stephen J. Lopes was consecrated as the first bishop of the Personal Ordinariate of the Chair of Saint Peter. Noting that his situation had no precedent, Monsignor Steenson asked the Congregation for the Doctrine of the Faith in a letter of 23 January 2016, after his resignation had been accepted but before his successor had taken possession, for clarification regarding his canonical status, specifically asking whether his “canonical status ... of ‘Ordinary Emeritus’ [is] equivalent to a bishop emeritus.” Monsignor Steenson also indicated that this was a significant question concerning his relationship to the bishops’ conferences and his status in any future assignment.

5.2.3 Cardinal Müller responded in a letter of 18 February 2016 (Prot. N. 204/11-54194) addressing Monsignor Steenson as “Ordinary Emeritus.” The letter did not answer the question of whether an ordinary *emeritus* is equivalent to a bishop *emeritus*, and did not mention anything about bishops’ conferences. It stated that “the figure of an Abbot was used as an analogy for someone who was not episcopally ordained and yet exercises governance” and that “[t]his same analogy can be carried forward now following your resignation from office, which requires a distinction between canonical status *per se* and certain rights and privileges which may be continued in light of your ministry.”¹⁵ The letter then states that Monsignor Steenson “remain[s] a priest incardinated in the Personal Ordinariate of the Chair of Saint Peter,” although it does not indicate how or when he had become incardinated in the Personal Ordinariate, since, unlike the other ordinaries of the other two personal ordinariates, he had never previously been so incardinated before his appointment as ordinary.¹⁶ The remainder of the letter details with matters of liturgical dress.

¹⁵ English original. Unpublished letter.

¹⁶ The decree of erection of the Personal Ordinariate of the Chair of Saint Peter provides in n. 7: “A cleric, having come originally from the Anglican Communion, who has already been ordained in the Catholic Church and incardinated in a Diocese, is able to be incardinated in the Ordinariate in accord with the norm of can. 267 CIC.” The canon referenced here describes the so-called “formal” process of incardination; in no case is incardination into a personal ordinariate for a cleric already ordained in the Catholic Church “automatic” or “implicit.” CONGREGATION FOR THE DOCTRINE OF THE FAITH, Decree of Erection of the Personal Ordinariate of the Chair of Saint Peter, 1 January 2012, at:

5.2.4 Although further elucidation was requested from the Congregation for the Doctrine of the Faith, particularly with regard the issues of the relationship of the retired ordinary with the episcopal conferences and canonical status, no further response was received. On 26 October 2016, Monsignor Steenson wrote to Archbishop Joseph E. Kurtz, the then President of the United States Conference of Catholic Bishops, enclosing the correspondence with the CDF and submitting this for his consideration. On 9 January 2017, Daniel, Cardinal DiNardo, who had succeeded Archbishop Kurtz as President of the United States Conference of Catholic Bishops in the meantime, replied by recalling Article 11 §3 of the complementary norms of the apostolic constitution *Anglicanorum coetibus*, “which stipulates that ‘A former Anglican Bishop who belongs to the Ordinariate may be invited to participate in the meetings of the Bishops’ Conference of the respective territory, with the equivalent status of a retired bishop.’”¹⁷ It is, to say the least,

http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20120101_chair-of-st-peter_en.html (26 June 2017).

The provision for incardination in the decrees of erection of the other two Personal Ordinariates is identical, leading to the somewhat anomalous question of to whom the first ordinary of the Personal Ordinariate of Our Lady of Walsingham should make the promise of obedience at his presbyteral ordination in the Catholic Church, since he became presbyter and ordinary at the same ceremony: can he promise respect and obedience to himself? But both other ordinaries are clearly incardinated in their respective Personal Ordinariates, since in each case the Personal Ordinariate of which they are ordinaries had been erected before they were ordained presbyters in the Catholic Church; in Msgr. Steenson’s case, he had been ordained to the presbyterate in the Catholic Church (and incardinated in the Archdiocese of Santa Fe) several years before the erection of the Personal Ordinariate of the Chair of Saint Peter. Compare CONGREGATION FOR THE DOCTRINE OF THE FAITH, Decree of Erection of the Personal Ordinariate of Our Lady of Walsingham, 15 January 2011, at: http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20110115_decree-erection-walsingham_en.html (26 June 2017); ID., Decree of Erection of the Personal Ordinariate of Our Lady of the Southern Cross, 15 June 2012, at: http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20120612_decree-erection-ordinariate-our-lady-southern-cross_en.html (26 June 2017).

To contribute to the ambiguity, when Msgr. Steenson was created a Protonotary Apostolic *sopranumerario* on 6 February 2012, about a month after he became Ordinary, the notice in AAS listed not his place of incardination, as is the case with almost all others so honoured, but rather simply *Stati Uniti d’America*. See AAS, 104 (2012), 670.

¹⁷ Unpublished letter. The letter continues: “While this norm will not apply to every non-episcopal Ordinary Emeritus of the Personal Ordinariate, it is certainly applicable to your unique situation. Accordingly, I am pleased to extend a heartfelt invitation for you to participate in future meetings of the USCCB as noted. I have every confidence that my brother bishops

strange that Monsignor Steenson may be invited to participate in the meetings of the USCCB as the former (Episcopal) Bishop of the Diocese of Rio Grande, but not as a former full member of the (Catholic) USCCB.

will join me in welcoming your participation, as a means of fostering mutual support and for expressing our common pastoral solicitude for the Catholic faithful of the United States.” The letter very carefully avoids establishing a precedent by its reference to the “unique situation.” The language of the final sentence quoted here echoes John Paul II’s *Apostolos suos*: see, e.g., nn. 13 and 17, in *AAS*, 90 (1998), 650f., 652f.

JURISPRUDENCE – I

EXCLUSION OF INDISSOLUBILITY (NOT *EXCLUSION OF PERMANENCE*) (C. 1101 § 2)

Sentence *coram* Jaeger, 11 May 2017, (U.S.A.)¹

1 – *The Facts*

1. – On 17 August 1996, three years after the start of their relationship, the Parties contracted marriage, in a civilly recognised Protestant wedding, in a Protestant house of worship named “[...] Evangelical [...] Church,” in the city of [...], in the territory of the Diocese of [...]. At the time, the Woman, now a Catholic, was a Baptist [born in 1974] and the Man was a Lutheran [born in 1971]. No children were born of the marriage. Their married life laboured under difficulties and was brought to an end in the beginning of the year 2000. Civil divorce followed on 14 June 2000.

2. – On 15 decembris 2010, the Ecclesiastical Court of the Diocese of [...], competent to hear the case by reason of the place of contract, admitted the Woman’s *libellus* claiming that the marriage was null. The Court joined the issue on the grounds of “a condition concerning the future”, on the part of the Woman, and “exclusion of the good of spouses,” on the Man’s part. The Respondent having been declared absent from the trial, the evidence having been assembled, all other things needing to be done having been accomplished, on 13 September 2011 the Court pronounced a definitive judgement in the negative, deciding that the nullity of the marriage, in the case, was not proved on either ground. Petitioner first appealed to the ordinary Appellate Court but later renounced the appeal and preferred to introduce instead a new case before the same first instance Court, on another ground. Thus on 20 March 2012 Petitioner submitted to the same Court a new *libellus* claiming that the marriage was null, on the

¹ Sentence c. Jaeger, 11 May 2017 (U.S.A.), Sent. 98/2017. English trans. by the Right Reverend Monsignor David-Maria A. Jaeger., O.F.M. Published with his permission.

ground of exclusion by herself of “the good of the sacrament” [i.e. indissolubility]. The *libellus* was admitted and, on 10 May 2012, the issue was joined on the aforementioned ground. Respondent was declared absent—just as he was never to reply to any summons in subsequent instances—and the evidence was assembled in the usual manner. All else needing to be done first having been accomplished, on 26 March 2013 the Court pronounced a definitive judgement in the negative, namely that the nullity of the marriage, in the case, was not proved on the ground on which the issue was being tried. Petitioner appealed and so the case came before the Metropolitan Ecclesiastical Court of Appeal. On 28 November 2012, the latter determined that the issue was to be tried on the same ground as in first instance. The Court of Appeal considered that the evidence already assembled was sufficient and proceeded at once to the further steps needed for decision. Finally, on 28 July 2015, the Appellate Court gave its definitive judgement in the affirmative, pronouncing that the nullity of the marriage, in the case, was proved on the aforementioned ground.

3. – On Petitioner’s initiative, the case was forwarded to This Apostolic Court. The Rotal Panel [*Turnus*] was properly constituted on 19 January 2016. On 12 April 2016, the issue to be tried in third instance was joined thus: “*Has the nullity of the marriage been proved, in this case*”. Upon the motion of Petitioner’s Rotal Counsel, further evidence was gathered in the form of a new judicial deposition of Petitioner. The trial record having been made available [“the acts published”], the pleadings and observations having been exchanged, all else having been done that needed to be done, it is now Our duty to give the decision on the matter before Us.

2 – The Law

4. – (The text following under this number is taken from the 15 December 2015 judgement before the same Ponens, presiding over a five-member Panel, in a case from Venice, Florida, under number 4 there, too [cite: *coram Jaeger, quinque videntibus, sent. diei 15 decembris 2015 Venetiarum in Florida, n. 4*])—“*Marriage enjoys the favour of the law*”. As all know, it is on this basis that

2 – In iure

4. – (Qui sub hoc numero sequitur textus sumitur e coram infrascripto Ponente, quinque videntibus, sent. diei 15 decembris 2015 Venetiarum in Florida, n. 4) – *Matrimonium iuris gaudere favore*, ut universi norunt, veluti fundamentum est omnis iudicii de adserta matrimonii, in casu particulari, nullitate. Quidnam effatum illud significet docemur: “*Ita est matrimonii favor: irritum dissolvere, ac*

any allegation of nullity in respect of a particular marriage is tried. As to what this proposition means, we are taught: “*This is what favours marriage: dissolving an invalid marriage and safeguarding a valid one*” (T. SANCHEZ, *Disputationum de sancto matrimonii sacramento tomi tres*, lib. 7, disp. 100, n. 14, Venetiis 1625, vol. 2, p. 363). A marriage can be invalid because of a diriment impediment or because of lack of the required form of celebration or, most importantly, because of the lack of consent. For indeed it is “*the consent of the Parties that makes marriage*”, which consent “*cannot be supplied by any human power*” (can. 1057 § 1), not even by the law itself. Obviously, for it to be able to have external, societal, legal effect (cf. can. 1057 § 1) – especially in terms of the “*bond, of its very nature perpetual and exclusive,*” which “*from a valid marriage, arises between the spouses*” (cf. can. 1134), this internal consent of both Parties must also be manifested, “*lawfully*”, namely in accordance with the norms of law (cf. can. 1057 § 1 and cann. 1108 ff.). Once the exchange of consent has taken place lawfully, “*the internal consent is presumed*” (cf. can. 1101 § 1; cf. also can. 124 § 2 and, specifically, can. 1060). Were the contrary to be alleged in a particular case, it must be proved, the burden of proof resting upon the person making the allegation. (cf. can. 1526 §§ 1 and 2, n. 1). [...] Consent is deemed to have been

validum tueri” (T. SANCHEZ, *Disputationum de sancto matrimonii sacramento tomi tres*, lib. 7, disp. 100, n. 14, Venetiis 1625, vol. 2, p. 363). Irritum potest esse matrimonium aut ob dirimens impedimentum aut ob requisitae celebrationis formae defectum aut, maxime, ob defectum consensus. Nam “*Matrimonium facit partium consensus*”, qui consensus “*nulla huamana potestate suppleri valet*” (can. 1057 § 1), ne ab ipsa quidem lege. Plane ut effectus parere possit externos, in societate, immo iuridicos (can. 1057 § 1), praesertim vero “*vinculum natura sua perpetuum et exclusivum*”, quod “*ex valido matrimonio enascitur inter coniuges*” (cf. can. 1134), hic animi utriusque partis consensus et manifestari debet, et quidem “*legitime*” seu ad normam iuris (cf. ibid.; cf. etiam cann. 1108 ss.). Legitima eiusmodi commutata manifestatione, “[i]nternus animi consensus praesumitur” (cf. can. 1101 § 1; cf. etiam can. 124 § 2 et, in specie, can. 1060). Contrarium autem, quoties in casu adseratur particulari, probari debet, probationis onere adserenti incumbente (cf. can. 1526 §§ 1 et 2, n. 1). [...] [C]onsensus defecisse censendus est sive cum utraque vel alterutra pars matrimonium, quod exterius contrahere videbatur, interius totum prorsus respueret et contrahere nolle sive cum partis voluntatis obiectum, quod consensus manifestatione eligeret, non matrimonium esset a Creatore conditum sed aliud aliquid seu aliquam alterius indolis maris et

lacking where either Party or both Parties internally wholly rejected the marriage that seemed outwardly to be contracted, and willed rather not to contract it, and likewise where the object of a Party's will, in choosing to manifest consent, was not marriage as instituted by the Creator but something else, namely some other kind of union between man and woman. The object of consent is other than marriage when a Party excludes from what it considers marriage something without which there can be no marriage. Thus can. 1101 § 2 states that the contracted marriage is invalid, i.e. null, "*if either or both of the Parties exclude by a positive act of the will the marriage itself*" – which is called, in jurisprudence, "total simulation" – "*or an essential element of marriage or an essential property of marriage*" – which is referred to, in jurisprudence, as "partial simulation"; which distinction (between "total" and "partial" simulation) appears to be "a distinction without a difference", given that the same effect is produced by either, namely that there is no marriage, in the given case.

5. – "*Indissolubility*," like "*unity*," is an "*essential property*" of marriage. (cf. can. 1056; cf. also canons 1141 and 1134 and 1085 § 1). Therefore, a Party that, in pronouncing the words of consent, intends to contract only a marriage capable of being dissolved, does not, in reality, contract marriage,

feminae coniunctio. Aliud quam matrimonium consensus est obiectum si pars ab eo, quod matrimonium forte putet, aliquod excludat sine quo matrimonium esse non possit. Etenim can. 1101 § 2 contractum matrimonium invalidum seu nullum declarat "*si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum*" – quod in iurisprudentia "*simulatio totalis*" nuncupatur – "*vel matrimonii essentialis aliquod elementum, vel essentialis proprietatem*" – quod nomine "*simulationis partialis*" in iurisprudentia venit; ast "*distinctio*" haec ("*totalem*" inter et "*partialem*" simulationem) "*sine differentia*" videtur, cum in utroque casu idem est effectus, matrimonium nempe in casu non haberi.

5. – Matrimonii "*essentialis proprietas*," praeterquam eius "*unitas*," eiusdem est "*indissolubilitas*" (cf. can. 1056; cf. etiam cann. 1141 et 1134 et 1085 § 1). Ideoque qui consensus verba proferens matrimonium contrahere intendat dissolubile tantum, in re non contrahit et matrimonium

and a marriage contracted with such an intention is null. Where such an exclusion [of indissolubility] is proved at trial, the marriage in question must be declared invalid. In our times, secular legal systems almost everywhere, especially in countries referred to as “developed,” do not recognise the indissolubility of marriage, and hold that marriage can be dissolved by divorce. Thus most often marrying couples, especially non-Catholics, not only do not know that indissolubility is an essential property of marriage, but do hold the erroneous opinion that marriage can really be dissolved by divorce. Nonetheless, the traditional jurisprudence that is even now in force does not allow for it to be simply presumed that such widespread error prevails over the natural will of human beings to contract a genuine marriage (cf. can. 1099). Still it may not be denied that such error, shared by so many, taken together with the very high incidence of civil divorce, prepares people to exclude indissolubility, by a positive act of the will, whenever they are quite uncertain that the otherwise desired marriage will be successful, namely where there are reasons to fear that the contrary may turn out to be the case; all the more so, whenever the persons about to marry do not follow the true religion. In other words, the error that it is possible for marriage to be dissolved by divorce is to be considered a “remote cause” of simulation. By this term there is meant some

ista intentione contractum nullum est et, exclusione in iudicio probata, declarari debet invalidum. In hodiernis rerum adiunctis, cum fere ubique, in mundi praesertim partibus quae “evolutae” dicuntur, iuris ordines (italice: “ordinamenti”) temporales matrimonii indissolubilitatem haud agnoscant et matrimonium s.d. divortio solvi posse censeant, nupturientes, praesertim acatholici, non solum indissolubilitatem esse matrimonii essentialem proprietatem saepe saepius ignorant, sed et errorem colunt matrimonium per divortium reapse solvi posse. Nihilominus translaticia et etiamnunc vigens iurisprudentia simpliciter praesumere non sinit longe lateque diffusum eiusmodi errorem naturali praevalere hominum voluntati genuinum contrahere matrimonium (cf. can. 1099). Tamen negari non potest istiusmodi communiorem errorem, una cum plurimis coniugali-bus convictibus quibus s.d. civile divortium finem imponat, animos parare ad excludendum indissolubilitatem, positivo nempe voluntatis actu, quoties haud certum praevideatur matrimonium ceteroquin desideratum bonum sortiturum esse exitum, exstantibus scilicet rationibus quibus timendum sit ne contrarium accadat; eo vel magis quotiescumque nupturientes verae non adhaereant religioni. Aliis verbis, istiusmodi error, matrimonium nempe per s.d. divortium solvi posse, pro simulationis “causa remota” habeatur, quo vocabulo intenditur quaedam “antecedens probabilitas” alterutram saltem partem

“antecedent probability” that at least one Party is going to simulate [consent]. Still, in order to prove simulation in a given case, it is necessary to prove that there was also, indeed principally, a proportionate “proximate cause,” on account of which at least one Party contracted the marriage while excluding indissolubility. Often this happens by way, as it were, of a “condition concerning the future,” e.g. when a Party doubts whether it be prudent to enter marriage with a certain other Party, knowing that that other Party suffers from some defects yet hoping that that other Party will change for the better, while at the same time fearing that the contrary may turn out to be the case. In such circumstances, it happens that the Party, doubting and anxious, chooses to enter the marriage while willing it only as a marriage capable of being dissolved, i.e. reserving the right to dissolve the marriage if, following the wedding, the other Party does not change its behaviour for the better and married life results too difficult. Once both the “remote” and, most especially, the “proximate” cause of simulation have become clear, the simulation itself is yet to be proved. Since simulation resides in the intention of the agent, in the human being’s heart, which God alone knows directly and infallibly, the “queen” of proofs is the confession of the simulating Party itself. To be sure, the confession by itself is not necessarily always to be held credible. Indeed, sometimes such confession

simulaturam fuisse. Ast ut simulatio in casu probetur particulari, probari oportet adfuisse etiam, et praecipue, proportionatam “causam proximam”, ob quam alterutra saltem pars hoc ipsum matrimonium nonnisi eiusdem indissolubilitatem excludens contraxerit. Quod saepe evenit ad modum cuiusdam veluti “condicionis de futuro”, ex. gr., cum pars dubitet num nuptias cum certa altera parte, quam vitiis cognoverit laborare, prudens sit inire, sperans ut altera pars suum agendi modum in meliorem convertat ast timens ne contrarium contingat. In istiusmodi rerum adiunctis, accidit ut dubitans et timens pars matrimonium eligat, quod autem dissolubile tantum velit, ius nempe sibi reservans coniugium dissolvere si, nuptiis initis, altera pars suum se gerendi modum in meliorem non converterit et coniugalibus vita nimis dura evaserit. Simulationis causa “remota” et maxime “proxima” deliquata, ipsa simulatio adhuc est probanda. Cum simulatio in agentis resideat intentione, in hominis scilicet corde, quod Deus solus directe et infallibiliter novit, probationum “regina” est ipsius simulantis confessio. Certo certius confessio seorsim considerata non necessario semper credibilis est censenda, immo aliquando de ea est suspicandum, v. gr., quoties prolata sit ab homine, qui alioquin parum credibilis videatur vel cum matrimonii, in casu, nullitatis, quae expetitur, declaratio effectus pareret temporalis ordinis in confitentis commodum et in alterius partis detrimentum – ut adhuc contingere potest ubi

must be considered suspect, e.g. when made by a person who appears to have little credibility otherwise, or when the declaration of nullity that the confessing simulator seeks may have effects in the temporal order that would benefit the confessing simulator at the expense of the other Party – as may still happen in places where the ecclesiastical decision in these matters is capable of being recognised also by the forum of the State. However, where the declaration of nullity, if issued, will have only spiritual effects, the temporal matters between the Parties having already been definitively settled by the courts of the State – and even more so, where the other Party, especially a non-Catholic other Party, does not appear at trial to contest the petition and makes no effort to defend its right to the contracted marriage – there is no reason for “pre-judicially” doubting the truthfulness of the confession. Moreover, it is surely to be presumed that a person seeking peace of conscience will have no interest to commit the grave crime of perjury. This appears to be confirmed by the Church’s Supreme Legislator in the new can. 1678 § 1, which lays down that: “*In marriage nullity cases, a [party’s] confession at trial and [other] statements of the parties, possibly supported by witnesses to the the parties’ credibility, can have the force of full proof, to be assessed by the judge after careful consideration of all the circumstantial and supporting evidence – unless there be other elements that counter them.*”

ecclesiastica de hisce rebus decisio etiam pro Civitatis foro valeat agnosci. Attamen ubi nullitatis declaratio non nisi spiritualis ordinis pariat effectus, rebus inter partes temporalibus a Civitatis magistratu definitive solutis, eo vel magis cum altera pars, acatholica praesertim, in iudicio haud resistat et suum ius ad semel contractum matrimonium defendere non satagat, de confessionis veritate non est cur “prae-iudicialiter” dubitetur. Immo quaerentis conscientiae consulere grave periurii scelus patrare minime interesse utique est praesumendum. Quod et Supremus Ecclesiae Legislator veluti confirmare videtur novato Codicis Iuris Canonici canone 1678 § 1 sic sonanti: “*In causis de matrimonii nullitate, confessio iudicialis et partium declarationes, testibus forte de ipsarum partium credibilitate sustentae, vim plenae probationis habere possunt, a iudice aestimandam perpensis omnibus indicis et adminiculis, nisi alia accedant elementa quae eas infirmant*”.

6. – “The short duration of conjugal life has always been considered as circumstantial evidence of the nullity of the bond – because of force and fear, or because of a positive act of the will excluding some essential element of marriage, or on the ground of the subjective incapacity of one or the other of the spouses to give true consent to marriage – as long as the short duration of married life and the lack of integrated married life are not to be attributed to extrinsic causes, e.g. to an unforeseen event that caused division between the spouses” (Supremum Tribunal Signaturae Apostolicae, sent. diei 29 novembris 1975, coram Em.mo Staffa, in *Periodica de re morali canonica liturgica* 66 [1977], p. 323, n. IX). More recently, too, the reigning Supreme Pontiff called to mind that there are “cases where the alleged nullity of marriage is supported by particularly evident arguments” (cf. FRANCISCUS PP., Litt. ap. M.p. datis, “*Mitis Iudex Dominus Iesus*” diei 15 augusti 2015, “IV”); among such arguments there appears to be numbered “a brief married life” (cf. Art. 14 § 1 of the *Ratio procedendi in causis ad matrimonii nullitatem declarandam*, attached to the aforementioned Apostolic Letter).

7. – Once the evidence has been assembled, and after the pleadings and observations and any responses have been presented, with all the other legal requirements, too, fulfilled, the Judges are to give a reasoned judgement, which is not, however, to be

6. – “Brevitas durationis vitae coniugalis semper habita est uti indicium nullitatis vinculi, sive ob vim et metum, sive ob positivum actum voluntatis excludentis aliquod elementum essenziale matrimonii, sive ob incapacitatem subiectivam alterutrius coniugum ad verum consensum matrimoniale praestandum, dummodo brevitatis vitae coniugalis et defectus integrationis vitae coniugalis non sit tribuendus causis extrinsecis, v. gr. eventui imprevisio qui coniuges dividit” (Supremum Tribunal Signaturae Apostolicae, sent. diei 29 novembris 1975, coram Em.mo Staffa, in *Periodica de re morali canonica liturgica* 66 [1977], p. 323, n. IX). Nuperius insuper Summus nunc regnans Pontifex monuit “de casibus in quibus accusata matrimonii nullitas pro se habet argumentorum peculiariter evidentium fulcimen” (cf. FRANCISCUS PP., Litt. ap. M.p. datis, “*Mitis Iudex Dominus Iesus*” diei 15 augusti 2015, “IV”), intra quae argumenta “*brevitas vitae coniugalis*” recenseri videtur (cf. art. 14 § 1 *Rationis procedendi in causis ad matrimonii nullitatem declarandam* modo memoratis Apostolicis litteris adnexae).

7. – Causae instructione peracta, discussione habita, ceteris impletis iuris requisitis, Iudices sententiam ferre tenentur motivis suffultam, quae autem non sit verbosa. Ad rem meminisse iuvat Supremum Ecclesiae hisce in teris Legislatorem et simul Iudicem

prolix. On this point, it is useful to keep in mind that the Supreme Legislator and Judge of the Church here on earth advised the Auditors of the Roman Rota received in Audience that: “in the judgement, it is sufficient to expound the reasons in law and in fact, on which it rests, without there being a need to report every single testimony given” (cf. S. IOANNES PAULUS PP. II, Adlocutio diei 26 ianuarii 1989, AAS 81 [1989] 925).

Romanae Rotae Auditores coram admissos monuisse quod “nella sentenza è sufficiente l’esposizione delle ragioni in diritto ed in fatto, sulla quale si regge, senza dover riferire ogni singola testimonianza” (cf. S. IOANNES PAULUS PP. II, Adlocutio diei 26 ianuarii 1989, AAS 81 [1989] 925).

3 – *The Law Applied to the Facts*

8. – *Certain premises.* – In dealing with this case, the lower Courts *absolutely erred* in translating into English the ground of exclusion of *indissolubility* (exclusion of the “good of the sacrament”) as exclusion “of permanence”; which is something else. Very unfortunately, the negative first instance decision appears to have converted this translation error into an error of law; unlike the affirmative second instance decision, which—though repeating the same translation error—was not misled by it and correctly interprets the stated ground of nullity. Since the relevant facts in the case are abundantly proved and are acknowledged even by the first instance Judges, it is well for us to deal, first of all, with what appears to be an error of law rooted in the erroneous English translation. Indeed, “permanence” means something different from “indissolubility.” No one, not even in North America, contracts marriage without wishing it to be *permanent*, i.e. without intending the “*permanence*” of the marriage covenant; else, they would not contract the marriage. Plainly, the civil law of none of the several States allows for, or has any concept of, a marriage contracted for a limited time only, and in each of the several States the law provides only for a *permanent* marriage. The difference, in relation to the teaching and laws of the Catholic Church, lies in this, that the States allow for marriages, albeit *in themselves* permanent, to be dissolved by divorce if they become unhappy, at least for one of the parties, i.e. after the manner of offering relief in case of an accident, in order to give succour to the victims of shipwreck. This all citizens know. Therefore, those who contract marriage in those States are aware that this worst-case remedy is to be available to them, *should it perhaps happen* that the marriage that they do wish to go on for life

does not, in fact, have a happy outcome. The canon law does not require, for the valid celebration of marriage, that the parties know that marriage is indissoluble; rather, it only requires that they know that marriage is *permanent* (cf. can. 1096 §§ 1-2). Indeed, not only *ignorance* but even intellectual *error* about indissolubility being an essential property of marriage, *does not destroy consent* (cf. can. 1099), unless, in a particular case, the error is so pervasive as to *determine the will* (cf. *ibid.*); likewise, unless – based perhaps on the error of the intellect – the contractant really intends to contract the marriage, in the given case, only as dissoluble, excluding the essential property of indissolubility from the consent *to this marriage*. Therefore, the contractant’s will that this marriage, which s/he is entering, be *permanent* can plainly be consistent—*subjectively*, in the contractant’s intention—with the contractant’s will to reserve the right to dissolve the marriage if it does not have the truly hoped-for, desired, outcome. In this kind of case, while the future misfortune is as such “hypothetical”, the exclusion of indissolubility, namely the act of the will whereby the contractant reserves the right to dissolve the marriage, is absolute. To say this once more: For an act of the will to render the marriage null, it is in no way required that it exclude “*permanence*”; rather, it is required that it exclude the *indissolubility* of this marriage, which the contractant does hope and wish will be permanent.

The first instance judgement, in its part on “applying the law to the facts”, appears not to know this. Specifically, the first instance judgement decides to attribute no probative force to the explicit confession of Petitioner Woman that, in marrying Respondent Man, she reserved the right to dissolve the marriage by means of divorce “if things didn’t work out.” The first instance judgement decided that this does not prove the ground of nullity because Petitioner Woman stated that her “goal” in entering into the marriage had been “to make the marriage last and I was hoping for a lifelong marriage,” which made it obvious that Petitioner had willed a permanent marriage. Indeed, it is certain that Petitioner positively intended “*permanence*”, but it is equally certain that Petitioner intended to contract a dissoluble marriage, and that it was with this intention that she chose to enter this marriage; otherwise she would not have entered this marriage.

Likewise the first instance judgement did not make the right use, in this case, of the traditional jurisprudence that holds that it is necessary to show that there was a “*causa simulandi*” prevailing over the “*causa contrahendi*.” According to its way of reasoning, it might never be possible to prove the ground of exclusion of indissolubility, since—according to what appears to be that judgement’s view on this matter—the mere fact that the contractant

did decide to enter into the marriage, and did enter into it, would prove that she did not exclude indissolubility. Thus the first instance judgement: “It is true that the Petitioner feared an alcoholic abusive marriage; but [it] has not [been] proven that this fear was more prominent than her desire for marriage,” because “[i]n fact, she appears to have set aside her fears in order to pursue the desire of her heart: marriage with the Respondent.” However, Petitioner “set aside her fears” precisely by reserving the right to dissolve this marriage, which she desired, should the marriage in fact prove to be “an alcoholic abusive marriage.” Indeed, given the proofs before them, the first instance Judges wholly gratuitously asserted that Petitioner’s “will was directed toward an indissoluble marriage”, while, in reality, what emerges from the proofs is that Petitioner’s will was directed towards a permanent marriage, which, however, was not to be indissoluble, indeed which was wholly dissoluble, and, under certain conditions, should they come about, would need to be dissolved.

The second instance Court overcame the error of law, rooted in the erroneous English translation, and, relying on the same proofs gathered in first instance together with a correct use of jurisprudence, especially that of Our Apostolic Court, came directly and safely to the affirmative decision, on the same ground, which we are now confirming in third instance.

9. – In the instant case, there is no doubt about the *credibility* of Petitioner as she confesses that she had excluded indissolubility. Following a close reading of the trial record, we must agree, as we do agree, with the second instance Judges’ assessment “that the Petitioner presented the facts in her written history and oral deposition in a candid, straight-forward manner,” and that she is therefore “credible”. Nor had the first instance Judges shown any doubt as to Petitioner’s credibility, and the difformity of the judgements in first and second instance appears to be attributable only to the aforementioned error of the first instance judgement concerning the meaning of the stated ground of nullity, namely to the confusion between indissolubility and “*permanence*”.

10. – Concerning the “remote cause” for simulation, namely the “antecedent probability” that, in marrying Respondent, Petitioner chose only a dissoluble marriage, it is helpful to remember these facts, which, being notorious, need not be proved here: In very many marriages celebrated in North America, married life comes to an end, which is followed by civil divorce whereby the civil magistrates declare the marriage to be dissolved. Therefore, most citizens know marriage only as dissoluble, excepting only those members of Christ’s faithful, to whom the Catholic Church’s doctrine on the indissolubility of marriage has been taught *whole and effectively*. At

the time Petitioner married Respondent, she was not of their number. Rather, in Petitioner's family of origin, and likewise in the Protestant community to which the family belonged, just as among the vast majority of people in that Nation, divorce was considered an entirely legitimate remedy for marital shipwreck. Regarding the doctrine and practice of the Protestant community, of which Petitioner's parents and the young woman herself were members, there is the testimony of the Reverend Witness who was the local congregation's Pastor at the time of the wedding and who took care of the parties' preparation for marriage. The Reverend Witness testifies that he, and his Christian congregation, certainly did not favour divorce; however, they did, as they do now, consider it licit, on those grounds that, in their opinion, the Lord Christ Himself admits as justifying it, such as adultery, "*emotional and physical neglect due to alcoholism, abandonment and abuse*". The Reverend Witness clarifies that [in his congregation] even in other cases, those who decided to dissolve their marriages by means of divorce may be admitted to the celebration of a new marriage to the extent that it is evident that their hearts have been converted. In any case, it is well known that our Protestant separated brethren do not believe marriage to be one of the Seven Sacraments of the New Law, since they acknowledge only two Sacraments instituted by Christ the Lord, namely Baptism and Holy Communion. They believe, too, that marriage and its dissolution come within the jurisdiction of the State, which alone they hold to be a sovereign power, not recognising the sovereignty of the Church.

11. – The parties' engagement, which, in its last year before the wedding, included about eight months of living together, was characterised by Petitioner's anxiety as she watched the Man's alcohol abuse. Petitioner knew, too, that both Respondent's father and his brother were alcoholics. To be sure, Petitioner had fallen in love with the good-looking Man, but, on account of the Man's behaviour, she was plagued by doubts regarding their relationship and future marriage. Respondent tried to resolve the disagreements that the problem caused between the parties by promising repeatedly ("he kept promising me") that he was going to change his behaviour for the better, namely that he was going to leave behind his alcohol abuse. This, though, did not come about, and the Man continued to abuse alcohol right up to the very day of the wedding (just as he was to continue to do thereafter). Therefore the Woman actively doubted the sincerity of the Man's promises and the prospects for a successful marriage. Hers were active ("positive") doubts, different from merely hesitating to bind oneself by a covenant to a marriage, the future course of which cannot, in the nature of things, safely be predicted; different from any natural "panicking" that is normal while preparing to wed. Nonetheless—whether because of her love for the Man or because

she considered herself bound by the engagement—Petitioner decided that she had to go through with the marriage, even as in the act of marrying Respondent she “*reserved the right*” to dissolve the marriage by means of divorce “if things didn’t work out”. Petitioner reserved this right since she intuited that what she did not want might happen, and that that for which she hoped might not take place. She understood that Respondent’s “problems with alcohol may continue to interfere and not allow him to commit fully to the marriage” that he was contracting, so that she might have no choice but “to leave the marriage at some point”. Petitioner believed she was acting properly in thus reserving the right to dissolve the marriage, knowing that, not only the State, but also her Christian congregation, admitted and, respectively, recognised divorce. Wherefore Petitioner, as she states, was hardly able to believe “that I couldn’t end the marriage at some point, especially if something happened with my spouse that I didn’t feel was appropriate or if he wouldn’t stop the alcoholism and that became more of a factor in the marriage”; whereupon Petitioner rightly [she held] “could go ahead and get a divorce”.

Questioned in this third instance Petitioner, always consistent, confirmed her previous confessions concerning the matter before Us, especially that she had chosen to contract this marriage only as a dissoluble marriage, meaning that “at some point, if I wanted to, I could end the marriage”—and that she had reserved the right to dissolve the marriage if it should happen that “something was in the way”. We consider that this further judicial questioning, on the motion of Petitioner’s Rotal Counsel, appears to have taken place only for the sake of an abundance of caution, and, in our opinion, it was not needed for us to have moral certainty that this marriage is null.

12. – In her testimony, Petitioner’s mother confirms, among other things, that, both during the period of engagement and after the wedding, Petitioner was anxiously worried about Respondent’s excessive consumption of alcoholic drinks. The Witness testifies that she had taught Petitioner, at the time of the latter’s girlhood, that a wife who was being abused by her husband, had the right to dissolve the marriage, and that she had admonished Petitioner to make use of this right if a future husband ever abused her. The Witness herself, at the time of Petitioner’s adolescence, separated from her own husband, Petitioner’s father, and sued for civil divorce; she is of the opinion that it would have been better if she had done it “sooner”. A Witness who is a friend of Petitioner’s family and a colleague at work of Petitioner’s mother, recalls that, before the wedding, Petitioner had reported to him that she “was very worried about Respondent’s drinking”. Among other things

that confirm Petitioner's statements, the same Witness reports that Petitioner had told him before the wedding "that she could get out of the marriage if things didn't really work out," and that he knew at the time that Petitioner "definitely came at her marriage with a contingency plan, if it didn't work out".

13. – After the wedding, too, Petitioner states, Respondent continued to abuse alcohol, uninterruptedly, not even laying off the drink during the honeymoon. As time went on, things got worse. Thus at nighttime, the Man either drank "*a lot of beer*", indeed "*a case of beer, so a twenty-pack,*" or consumed "*almost a liter of alcohol*": either "*a lot of rum*" or "*lot of whiskey*." Indeed, by the last year of married life, the Man "*could put away a case—of beer—very easily or a liter*". Among other things, Petitioner "found it very disrespectful that he continued to drink as much as he did despite the fact that [Petitioner] found it very disturbing." Respondent "didn't seem to care"; which, Petitioner states: "bothered me". "Towards the end of our marriage—Petitioner reports—[Respondent] actually became quite verbally abusive". Besides, the Parties "just couldn't communicate because [Respondent] was drunk most of the time and it was really hard when you were sober and he's not, to carry on a meaningful conversation". In the end, when a drunken Respondent became violent and "pushed out of bed" Petitioner who was refusing to have conjugal relations with him in his drunken state, Petitioner "felt I needed to leave, 'cause I felt like everything I was putting into our marriage was for naught", her hopes that Respondent might change his behaviour for the better having been all in vain. Thereafter Petitioner sued for civil divorce, consistently with the right that she had reserved while marrying Respondent. To the question: "Why did you initiate the divorce proceedings?" Petitioner gives this answer: "I felt that there was truly 'no marriage' because of his alcohol use and I [had] reserved the right to seek divorce because of that."

14. – The Rotal deputy Defender of the Bond has carried out her duties zealously and has fought hard for the bond. In her duly presented observations, she argues that what we have here is essentially "a mere predisposition of the mind in Petitioner", to wit only "a false notion" that Petitioner had of marriage, that it is all essentially "a mere habitual or interpretative intention," and so on. Petitioner's prevailing will, the deputy Defender of the Bond argues, in accordance with her role, was to contract marriage. Yet it is certain from the trial record that Petitioner willed the marriage precisely as dissoluble, and that the Woman's will to contract marriage with Respondent prevailed over her doubts precisely on account of what she held to be the dissoluble nature of the marriage. It might perhaps be possible to discuss

whether the deeply ingrained error in Petitioner's conception of marriage might even by itself be sufficient to prove the nullity of this marriage, since in choosing marriage the Woman could only choose that which she knew marriage to be, i.e. a marriage that either party would be allowed, at least for just cause, to dissolve, and that would never be indissoluble. However, in this case, it is hardly necessary to deal with such a complicated question since there are clear proofs that Petitioner, while surely relying on such a concept of marriage as such, decided to enter *this marriage itself* precisely as dissoluble, because of the serious worries and doubts raised in her mind by Respondent's alcohol abuse, and that Petitioner's will to contract this marriage prevailed over those worries and doubts precisely by reason of the right she reserved to dissolve the marriage, which right she intended to use if Respondent's behaviour were to go on, destroying the marriage relationship. Which did then in fact come about, with Petitioner using the right she reserved to dissolve the marriage.

15. – Having regard to the time that has since gone by, and to Petitioner's conversion to the Faith, as well as to the new union in which she now lives, likewise to the reports in the record of Respondent's efforts to find a cure and to make a new life for himself and establish a new family, We decide not to impose any "vetitum". Rather, We *wholeheartedly* wish both Parties equally that, "*forgetting those things which are behind, and reaching forth unto those things which are before*", they may yet enjoy a happier life here on earth and then obtain "*the prize of the high calling of God in Christ Jesus*" (cf. Phil 3, 13-14). Thus indeed has the reigning Supreme Pontiff Himself expressed His wishes for those of Christ's faithful the bond of whose failed marriage has been declared null: "May the faithful, above all the wounded and the unhappy, look to the new Jerusalem which is the Church as « the peace of righteousness and the glory of godliness » (Baruc 5, 4), and may it be granted unto them, as they find once more the open arms of the Body of Christ, to sing the [returning] exiles' Psalm (126, 1-2): «When the LORD restored the captives of Sion, we thought we were dreaming. Then our mouths were filled with laughter; our tongues sang for joy»" (cf. FRANCISCUS PP., *Rescriptum ex Audientia SS.mi diei 7 decembris 2015*, in *L'Osservatore Romano*, CLV n. 284 [47.122] 12 dec. 2015, p. 8).

16. – All of which things having been considered as well in law as in fact, We, the undersigned Prelates Auditors of the Panel, sitting in judgement and having God alone before our eyes, having called upon the name of Christ, do decide to reply to the proposed doubt:

AFFIRMATIVELY, WHICH IS TO SAY: THE NULLITY OF THE MARRIAGE, IN THIS CASE, HAS BEEN PROVED.

Given in Rome, at the seat of the Court of the Roman Rota, on the 11th of May 2017.

David-Maria A. JAEGER, *Ponens*

Vitus Angelus TODISCO

Philippus HEREDIA ESTEBAN

This judgement, since it confirms another judgement, is made executive.

JURISPRUDENCE – II
INCAPACITY TO ASSUME
(CAN. 1095, 3^o)
(OBSESSIVE COMPULSIVE PERSONALITY DISORDER)

Sentence *coram* Defilippi, 23 April 2009 (San Diego, CA, USA)¹

1 – *The Facts*

1. Maria and Matthew met in 1978 at a certain Abby of the Monks of St. Benedict, where they stayed for a year as lay members of the so called “Charismatic Renewal Movement.”

Since they were mutually attracted, they developed a close relationship. In the autumn of 1979 they left the Abby and then they decided by mutual agreement to contract marriage.

Therefore, marriage was celebrated in church in San Diego on 17 March 1980.

Conjugal life, which was blessed by the birth of three children, with the passage of time became intolerable for the woman, and in 1992 she reached the point of a temporary separation which lasted some months, and finally secured definitive separation in 2000. Then, at the instance of the woman herself, the competent Civil Tribunal issued a sentence of divorce in June of 2001.

2. Finally, by the *libellus* presented on 19 August 2001 to the Diocesan Tribunal of San Diego, which was competent in accord with the norm of canon 1673, §1, Maria accused the marriage of nullity.

According to canon 1425, §4 of the Code of Canon Law, the Judicial Vicar assigned himself to handle the case as sole judge, and on 4 November

¹ Sentence *c.* Defilippi, 23 April 2009, (San Diego, CA, USA), in *Il diritto ecclesiastico*, [1-2] (2009), 205-220 and *RRD*, 101 (2016), 59-74. English trans. by Anthony St. LOUIS-SANCHEZ, JCL. Translated and published with permission of the Dean of the Roman Rota, 5 June 2014.

2001 he defined the terms of the controversy according to this formula: “Whether this marriage is null on the ground of incapacity to assume the essential obligations of marriage for causes of a psychic nature on the part of the respondent (canon 1095, 3°).”

Then the instruction of the cause was carried out through the responses of the parties and witnesses to the questions prepared by the Tribunal, and through the acquisition of an expert opinion of a certain *ex officio* expert. And after completing everything which had to be completed, the judge issued an affirmative sentence on 14 August 2002.

The respondent, who vigorously opposed the petition of the petitioner right from the beginning, and who was assigned an *ex officio* advocate, appealed to Our Apostolic Tribunal.

The *Turnus*, which was legitimately constituted by the Dean by the decree of 31 January 2003, dealing with the cause in a preliminary way in accord with the norm of canon 1682, §2 and article 58, §2 of the Norms of the Tribunal of the Roman Rota, determined by its decree of 5 February 2004 that the cause must be admitted to an ordinary examination of the new grade.

Then, because the parties had indicated their intention to pursue the trial, the Dean appointed an advocate *ex officio* for both parties.

At the instance of the advocate of the petitioner, the *Ponens* defined, by the decree of 30 November, 2004, the terms of the controversy according to this formula: “Whether there is proof of nullity of marriage in the case because of incapacity of the man respondent to assume the essential matrimonial obligations, according to canon 1095, 3° of the Code of Canon Law.”

A supplementary instruction of the cause was completed through a new judicial examination of the petitioner, through declarations submitted in writing by some witnesses and through two new *ex officio* opinions about the psychic condition of the respondent.

Then the respondent himself, because he desired to consecrate himself to religious life at a certain Abby, requested on 21 May 2007 that the treatment of the cause of separation of spouses be added. But, after taking into account those things which must be considered, this request was rejected by Our *Turnus* by the decree of 25 October 2007.

Finally, after the acts were properly published, the cause was submitted for discussion, with the dialectic intervention of the advocates of the parties and the deputed defender of the bond.

Therefore, today the cause is proposed to the Undersigned to be defined in the second grade of trial and under the doubt reported above.

2– The Law

3. Marriage, as they say, “*in facto esse*” arises from the consent of the spouses, as from a cause absolutely necessary and which cannot be detracted from in any way: “The consent of the parties, legitimately manifested between persons *habiles* by law, makes marriage; no human power is able to supply this consent” (can. 1057 §1).

Consent is “an act of the will by which a man and a woman mutually give and accept each other through an irrevocable covenant in order to establish marriage,” namely, to constitute that institution which has its own unique objective structure. For the conjugal partnership is ordered “by its nature to the good of the spouses and the procreation and education of offspring” (can. 1055 §1), is endowed with the essential properties of unity and indissolubility (can. 1056), and between the spouses it gives rise to “a bond which by its nature is perpetual and exclusive” (can. 1134). From this bond they are bound by special and equal rights and obligations, which indeed endure for life, because we are dealing with a total and irrevocable mutual donation (cf. *Gaudium et Spes*, n. 48; *Familiaris consortio*, n. 20).

Particularly, because the consent of the spouses is the sole, sufficient and absolutely necessary efficient cause of the marriage, to be able to

2 – In iure

3. Matrimonium uti aiunt “*in facto esse*” oritur ex consensu nubentium tamquam ex causa omnino necessaria et quae nullo modo derogari potest: “Matrimonium facit partium consensus inter personas iure habiles legitime manifestatus, qui nulla humana potestate suppleri valet” (can. 1057 §1).

Qui consensus, est “actus voluntatis quo vir et mulier foedere irrevocabili sese mutuo tradunt et accipiunt ad constituendum matrimonium”, scil. ad constituendum illud institutum, quod suam peculiarem structuram obiectivam habet. Nam consortium coniugale “indole sua naturali ad bonum coniugum atque ad prolis generationem et educationem” ordinatur (can. 1055 §1), insignitur essentialibus proprietatibus unitatis et indissolubilitatis (can. 1056), et inter coniuges gignit “vinculum natura sua perpetuum et exclusivum” (can. 1134), ex quo ipsi obstringuntur peculiaribus aequis iuribus ac obligationibus, quae quidem ad vitam perdurant, cum agatur de mutua donatione plena atque irrevocabili (cf. *Const. Past. Gaudium et Spes*, n. 48; *Adhort. Apost. Familiaris consortio*, n. 20).

Proprie cum sit unica, sufficiens atque absolute necessaria causa efficiens coniugii, consensus nubentium, ut par sit ad illos ponderosos effectus

give rise to those weighty effects, it can be validly manifested only between persons who are endowed with the adequate capacity required by both natural and positive law. That is to say, “a specific capacity of the spouses is required, which is indirectly confirmed or deduced from the threefold norm sanctioned by canon 1095, which establishes that they are incapable of contracting marriage: 1) who lack sufficient use of reason; 2) who suffer from a grave defect of discretion of judgment about the matrimonial rights and duties mutually to be handed over and accepted; 3) who are not able to assume the essential obligations of marriage because of causes of a psychic nature” (*coram* Turnaturi, 13 April 2000, in *RRDec.*, vol XCII, p. 348, n. 6).

Although, the abovementioned canon 1095 was not found in the 1917 *CIC* (under the regime of which the marriage was celebrated, and whose nullity is under consideration), nevertheless recourse to the present Code is legitimate. For, “the norm concerning consensual incapacity included in canon 1095 sets forth the principles of natural law, which must be considered to have been already implicitly embedded in the old Code” (*coram* Sable, 22 April 1997, in *RRDec.*, vol LXXXIX, p. 343, n. 4), insofar as they were derived from the general principle: “consent makes marriage.” And the established jurisprudence of Our

gignendos, valide manifestari potest solummodo inter personas, quae praeditae sint adaequata capacitate requisita iure tum naturali tum positivo. Scilicet “specifica requiritur nubentium capacitas, quae indirecte firmatur seu deducitur e triplici norma sancita per can. 1095, statuentem quod sunt incapaces matrimonii contrahendi: 1) qui sufficienti rationis usu carent; 2) qui laborant gravi defectu discretionis iudicii circa iura et officia matrimonialia mutuo tradenda et acceptanda; 3) qui ob causas naturae psychicae obligationes matrimonii essentielles assumere non valent” (*coram* Turnaturi, sent diei 13 aprilis 2000, *RRDec.*, vol XCII, p. 348, n. 6).

Quamvis nuper memoratus can. 1095 non inveniatur in *CIC* anni 1917 (sub cuius regimine celebratum est matrimonium, de cuius nullitate agendum est), tamen legitimus est recursus ad vigentem Codicem. Nam “norma de consensuali incapacitate in can. 1095 recepta, principia iuris naturalis explicat, quae in veteri Codice iam uti implicite insita habenda sunt” (*coram* Sable, sent. diei 22 aprilis 1997, *RRDec.*, vol LXXXIX, p. 343, n. 4), quatenus hauriebantur ex illo generali principio: “consensus facit nuptias”, et quae solidata iurisprudentia Nostri Fori iam aptabat in iudiciis, sicut agnitum est a Summo Pontifice in Allocutione diei 23 ianuarii 1992 ad N.A.T.:

Tribunal was already applying these principles in decisions, as was recognized by the Supreme Pontiff in the Allocution to Our Apostolic Tribunal on 23 January 1992: “it was precisely the jurisprudence of this tribunal, which – although remaining within the impassable limits of divine natural law – was able to foresee and anticipate certain canonical regulations, [...] which later were included in the present Code. This would not have been possible if the research, attention and sensitivity which were brought to bear on the reality of the *human person* had not guided and illumined the Rota’s work of jurisprudence. Naturally this was done with the help and the reciprocal influence of canonical science and those humanistic studies based on a correct philosophical and theological anthropology (AAS, 85 [1993], p. 143, n. 5).

“e stata la giurisprudenza di Codesto Tribunale che, pur muovendosi entro i confini invalicabili della legge divino-naturale, ha saputo prevenire ed anticipare statuizioni canoniche [...] poi definitivamente consacrate nel vigente Codice. Il che non sarebbe stato possibile, se la ricerca, l’attenzione, la sensibilità portate sulla realtà ‘uomo’ non avessero guidato ed illuminato l’opera giurisprudenziale della Rota, con l’ausilio naturalmente e con la reciproca influenza della scienza canonistica ed insieme delle discipline umanistiche fondate in una corretta antropologia filosofica e teologica” (AAS 85 [1993], p. 143, n. 5).

As is clear, in our case, we have to deal with the third species of incapacity sanctioned in the cited canon; namely: the incapacity of assuming the essential matrimonial obligations.

Uti patet, nostro in casu, pertractandum est de tertia facti-specie incapacitatis in commemorato canone; scilicet: de incapacitate assumendi obligationes matrimoniales essentielles.

4. As we read what is written in our decree of 5 February 2004, we must first of all note that the incapacity, mentioned in canon 1095, 3° of the *CIC*, affects “persons who, although perhaps have been endowed with adequate discretion of judgment, remain unfit to assume or fulfill the essential obligations of marriage because of their own psychic condition.

4. Sicut scriptum in Nostro decreto diei 5 februarii 2004, praevidendum est incapacitatem, de qua agitur in can. 1095, n. 3 *CIC* eas afficere “personas quae, quamvis fortasse adaequata iudicii discretione praebitae sint, ob suam psychicam condicionem, impares exstant ad essentielles matrimonii obligationes assumendas seu perficiendas.

“Truly, in this case the principle already handed down in the most notable Rule of Roman Law is verified: ‘Impossible obligations are void’ (Celsus, D. 50, 17, 185), and in the law of the Church it was assumed in this way: ‘No one can be obliged to the impossible’ (*Regula Iuris* in VI°, 5, 12, 5)” (Decree of the *Turnus*, n. 4, a).

5. “In order that the incapacity for contracting marriage may exist according to the norm of canon 1095, 3° of *CIC*, first of all one must recall that it must concern a certain condition, on account of which the one marrying is in fact *morally incapable* of assuming the essential conjugal obligation at the time when the marriage was celebrated. Therefore, a proper distinction must be kept in mind between “mere difficulty” and “moral incapacity,” just as the Supreme Pontiff suitably taught in his allocution to Our Apostolic Tribunal on 5 February 1987: ‘For the canonist the principle must remain clear that only incapacity and not difficulty in giving consent and in realizing a true community of life and love invalidates a marriage’ (AAS, 89 [1987], p. 1457)” (Decree of the *Turnus*, n. 4, b).

For, it can happen that the parties, “after the marriage has failed, reclaiming their personal freedom, may invent for themselves, by using elective memory, alleged motives of

Hoc in casu nempe verificatur principium iam traditum in notissima *Regula Iuris Romani*: “*Impossibilium nulla obligatio est*” (Celsus, D. 50, 17, 185), et quod in *Iure Ecclesiae* ita assumptum est: “*Nemo potest ad impossibilia obligari*” (*Regula Iuris* in VI°, 5, 12, 5)” (Decretum *Turni*, n. 4, a).

5. “Ut incapacitas matrimonii contrahendi exsistat ad normam commemorati can. 1095 n. 3 *CIC*, imprimis recolendum est agi debere de quadam condizione, ob quam nubens, tempore celebrati matrimonii reapse moraliter incapax sit assumendi coniugales obligationes essentielles. Ideo: apta distinctio prae oculis habenda est inter “meram difficultatem” et “moralem incapacitatem”, sicut opportune docuit Summus Pontifex in Allocutione ad N.A.T. diei 5 februarii 1987: “Per il canonista deve rimanere chiaro il principio che solo la incapacita e non gia la difficolta a prestare il consenso e a realizzare una vera comunita di vita e di amore rende nullo il matrimonio” (AAS LXXIX [1987], p. 1457)” (Decretum *Turni*, n. 4, b).

Nam accidere potest ut partes, “post matrimonii naufragium, propriam libertatem reposcentes, sibi fingant, memoriae electivae ope, motiva praetensa nullitatis quas nuncupant “incapacitates”,

nullity which they call ‘incapacities’, but which must be more correctly regarded as “difficulties” (*coram* Sable, 13 January 2000, in *RRDec.*, vol. XCII, p. 7 n. 10).

To express it clearly, it must be a matter of true “practical” moral incapacity, because of which the one contracting is not able to put into practice some essential matrimonial obligation, although he or she may celebrate marriage with the right intention, and may want to fulfill the accompanying obligations.

Furthermore, one must clearly distinguish “minimal” capacity, which is required for validly contracting marriage and which can coexist with other defects of character and behaviors which are almost inevitably found in those who live in the present world, from “full” capacity, which is perhaps demanded for an absolutely happy conjugal life, but which is not required for the validity of the matrimonial consent.

Of course, there is no doubt that the said incapacity must exist, at least in a latent form, at the moment the marriage is celebrated, since the marriage, as they say “*in facto esse*,” arises or not when matrimonial consent is exchanged between the contractants.

6. Furthermore, the incapacity must concern the *essential obligations of marriage*. Evidently, “a distinction

sed quae rectius “difficultates” enumerandae sunt” (*coram* Sable, sent. Diei 13 ianuarii 2000, *RRDec.*, vol. XCII, p. 7, n. 10).

Ut perspicue dicamus, agi debet de vera morali incapacitate “practica”, qua contrahens in praxim deducere non valet aliquam essentialem matrimonialem obligationem, quamvis recta intentione matrimonium celebret, et consequentes obligationes adimplere velit.

Praeterea perspicue distinguenda est capacitas “minima”, quae requiritur ad matrimonium valide contrahendum et quae coexistere potest cum aliquibus vitiositatibus indolis et agendi rationibus quae fere inevitabiliter inveniuntur in iis qui in praesenti mundo vivunt, a capacitate “plena”, quae fortasse postulatur ad convictum coniugalem omnino felicem, sed quae non exigitur ad validitatem consensus nuptialis.

Ut par est, non est dubium quin illa incapacitas exsistere debeat, saltem modo latent, momento quo matrimonium celebratur, cum matrimonium, uti aiunt “*in facto esse*”, exoritur vel non quando inter nubentes commutatur consensus nuptialis.

6. Praeterea incapacitas respicere debet obligationes matrimonii essentielles. Scilicet: distinctio fieri debet

must be made between the obligations which are truly essential, and others which constitute only a complement to or something accidental in the nuptial covenant. And these certainly do not pertain to the esse of the thing, but rather to its well-being” (*coram* Doran, 18 March 1988, *RRDec.*, vol. LXXX, p. 176, n. 5).

Therefore “We are dealing only with the institutional or inter-subjective obligations, and, like obligations of justice, these have a juridic character, and are inherent to the essential goods and ends, that is, ordinations of marriage (cf. J. Hervada, “Obligaciones esenciales del matrimonio,” in *Incapacidad consensual para las obligaciones matrimoniales*, Pamplona, 1991, p. 24). However, individually “they are obligations derived from the three Augustinian ‘bona’ – fidelity, children, sacrament – and these in fact essentially characterize marriage, as has always been believed, because marriage cannot begin if the contractant does not accept those things which are necessarily implied in those goods, or if the contractant does not have the capacity to fulfill them” (*coram* Burke, 13 June 1991, in *RRDec.*, vol. LXXXIII, p. 413, n. 5). And likewise, the essential obligations of marriage spring forth from the good of the spouses, which, according to some, implies the interpersonal psychic capacity to establish with the partner at least a tolerable interpersonal relationship. And “it includes

inter obligationes, quae revera essentialia sunt, ab aliis quae complementum tantummodo seu accidentale quid constituunt in foedere conubiali: quae nempe non ad esse rei pertinent, potius autem ad bene esse” (*coram* Doran, sent. diei 18 martii 1988, *RRDec.*, vol. LXXX, p. 176, n. 5).

Ideo “Agitur de obligationibus institutionalibus tantum, quae, tamquam obligationes iustitiae, indolem iuricam habent, et essentialibus matrimonii bonis ac finibus, seu ordinationibus, inhaerent (cf. J. Hervada, *Obligaciones esenciales del matrimonio in Incapacidad consensual para las obligaciones matrimoniales*, Pamplona 1991, p. 24). Singillatim autem “sunt illae obligationes quae derivantur a tribus ‘bonis’ augustinianis – fide, prole, sacramento – quae quidem bona, uti semper creditum est, coniugium essentialiter characterizant, quia matrimonium esse incipere non potest si contrahens non acceptet ea quae in illis necessarie implicantur, vel si capacitatem ea adimplendi non possideat” (*coram* Burke, sent. diei 13 iunii 1991, *RRDec.*, vol. LXXXIII, p. 413, n. 5). Itemque obligationes matrimonii essentielles prosiliunt ex bono coniugum, quod, iuxta aliquos, implicat capacitatem psychicam intrapersonalem instaurandi cum comparte relationem interpersonalem saltem tolerabilem, et “amplectitur susceptionem et adimplentionem omnium obligationum quae realem reddunt intimam coniunctionem ac integrationem personarum in adiutorio sibi mutuo praestando in

the assumption and fulfillment of all obligations which render real the intimate union and integration of persons in offering each other mutual assistance in the spiritual, material and social order so that a true conjugal life is established and lived out peacefully and progressively” (*coram* Bruno, 17 May 1996, in *ibid.*, vol. LXXXVIII, p. 390, n. 6; cf. *coram* Boccafolà, 1 December 1993, in *ibid.*, vol. LXXXV, p. 739, n. 6)” (*coram* Stankiewicz, 27 January 2000, in *ibid.*, vol. XCII, p. 105, n. 6).

Nevertheless, there are those who deny that the obligation to strive for the mutual spiritual and affective perfection, that is, for interpersonal integration of the will and emotions, must be counted among the essential obligations which flow forth from the good of the spouses. This is because they do not represent the juridic character, that is, of justice, insofar as “the internal acts and states of the will and of the emotions – which are also internal – are not able to constitute a juridic right or obligation” (J. Hervada, “Obligaciones esenciales del matrimonio,” pp. 34ff). Somehow among those obligations the capacity for establishing at least a tolerable interpersonal relationship with the partner in order to fulfill the state of conjugal life must indeed be admitted.

7. Finally, it is necessary that the incapacity to assume the essential obligations of marriage arises from a

ordine spirituali, materiali et sociali ut vera vita coniugalis instauretur ac pacifice et progressive ducatur” (*coram* Bruno, sent. diei 17 maii 1996, *ibid.*, vol. LXXXVIII, p. 390, n. 6; cf. *coram* Boccafolà, sent. diei 1 decembris 1993, *ibid.*, vol. LXXXV, p. 739, n. 6)” (*coram* Stankiewicz, sent. diei 27 ianuarii 2000, *ibid.*, vol. XCII, p. 105, n. 6).

Non desunt tamen qui negant inter obligationes essentielles quae profluunt ex bono coniugum ascribendam esse obligationem tendendi ad mutuam perfectionem spiritualem et affectivam, seu ad integrationem interpersonalem voluntatis et affectuum, quia reapse non praebent indolem iuridicam seu iustitiae, quatenus “los actos internos y los estados de la voluntad y del afecto – que tambien son internos – no son capaces de constituir un derecho ni un deber juridico” (J. Hervada, *Obligaciones esenciales del matrimonio*, op. cit. pp. 34 s). Utcumque inter illas obligationes admittenda quidem est capacitas instaurandi relationem interpersonalem saltem tolerabilem cum comparte ad explendum statum vitae coniugalis.

7. Denique requiritur ut incapacitas ad obligationes matrimonii essentielles assumendas oriatur ex causa naturae

cause of a psychic nature. For, according to the already cited Allocution of the Supreme Pontiff of 5 February 1987: “a real incapacity is to be considered only when an anomaly of a serious nature is present” (AAS 79 [1987], p. 1457).

In short, we must say that “a cause of a psychic nature, required by law to constitute the incapacity to assume the matrimonial obligations, is not only to be found in the pathological condition of the contractant, but also among every cause determined by psychologists and psychiatrists within the scope of their science. And this cause renders the contractant incapable of constituting the nucleus of the community of life and love, notwithstanding the good will of the party” (*coram* Huber, 7 November 2001, n. 7).

According to the jurisprudence of Our Tribunal, the obsessive-compulsive personality disorder and the so-called “Schizoid Personality Disorder” must be included among the causes of a psychic nature, which, in view of the nature of these disorders (which are described in “DSM-IV, F60.5-301.4 and F60.1-301.20”), can render a contractant incapable particularly with respect to assuming the good of the spouses.

As is evident, it pertains to experts in psychiatric, that is, psychological matter, to define in each concrete case what these “anomalies of a

psychicae. Nam, iuxta iam commemoratam Allocutionem Summi Pontificis diei 5 februarii 1987: “Una vera incapacita e ipotizzabile solo in presenza di una seria anomalia” (AAS 79 [1987], p. 1457).

Ut breviter dicamus, asserendum est “causam naturae psychicae, a lege requisitam ad incapacitatem onera matrimonialia assumendi constituentem, non solum in contrahentis conditione pathologica inveniri, sed etiam in omni causa a psychologis et psychiatris in ambitu eorum scientiae determinata, quae contrahentem incapacem reddat constituendi nucleum communitatis vitae et amoris, haud obstante bona voluntate partis” (*coram* Huber, Derrien., decisio diei 7 novembris 2001, n. 7).

Iuxta iurisprudentiam Nostri Fori, inter causas naturae psychicae, quae, attenta natura indiciorum harum perturbationum (quae recensentur in opera “DSM-IV, F60.5-301.4 et F60.1-301.20”) nubentem incapacem reddere possunt praecipue quod attinet ad assumendum bonum coniugum, annumerandae sunt perturbatio obsessiva-compulsiva personalitatis et s.d. “Disturbo Schizoide di Personalita”.

Uti patet, ad Peritos in re psychiatrica seu psychologica, pertinet definire, in singulis casibus concretis quanam sint hae “anomaliae naturae psychicae”.

psychic nature” are. Anyway, Rotal judges agree in requiring the gravity of the alleged “psychic anomaly” or “personality disorder.”

“On the other hand, either incomplete education, or inadequate preparation to celebrate marriage, or haste and imprudence in choosing the spouse, or insufficient reflection and negligence in deciding about contracting marriage and in carrying out the conjugal duties, these, *per se*, cannot be considered as a cause of incapacity for contracting marriage because they are not of a psychic nature” (Decree of the *Turnus*, n. 4, d).

8. In order that the nullity of marriage can be declared, on the alleged ground, “the judge must have moral certitude about the matter to be decided by the sentence” (can. 1608 §1); and “the judge must derive this certitude from the acts and the proofs” (can. 1608, §2), that is, through “proofs of any kind,” which are brought forward as “useful for adjudicating the cause [...] and [are] licit” (can. 1527, §1).

Because the truth in these kinds of causes is discovered only through the so called “inductive” method, first of all, to prove either perhaps the concrete incongruent behaviour of the subject, or the link between such incongruent behaviour and certain psychic anomaly, the indications drawn from the testimonies

Utrumque Iudices Rotaes conveniunt in postulanda gravitate assertae “anomaliae psychicae” vel “perturbationis personalitatis”.

“E contra, cum naturae psychicae non sint, tamquam causa incapacitates matrimonii contrahendi, per se, percenseri nequeunt sive temeritas et imprudentia in seligendo coniuge, sive inconsiderantia atque neglegentia in decernendo de matrimonio contrahendo et in perficiendis coniugalibus oneribus” (Decretum *Turni*, n. 4, d).

8. Ut declarari possit nullitas matrimonii, ob adductum caput, “requiritur in iudicis animo moralis certitudo circa rem sententia definiendam” (can. 1608 §1); quam “certitudinem iudex haurire debet ex actis et probatis” (can. 1608, §2), seu per “probationes cuiuslibet generis”, quae adductae sunt utpote “ad causam cognoscendam utiles [...] et licitae” (can. 1527, §1).

Cum in huiusmodi causis veritas detegatur tantummodo via sic dicta “inductiva”, imprimis, ad probandam sive concretam fortasse incongruentem agendi rationem subiecti, sive connexionem illius incongruentis agendi rationis cum quadam psychica anomalia, ponderanda sunt indicia quae hauriuntur ex vadimoniis partium

and witnesses must be weighed, without failing to establish their credibility. Similarly, if they are readily available, the documents, especially those of medical doctors, which are pertinent to the matter, must be considered.

Furthermore, “the judge is to use the services of one or more experts unless it is clear from the circumstances that it would be useless to do so” (can. 1680 *CIC*; cf. also Instr. *Dignitas connubii*, art. 203, §1), because the intervention of an expert is necessary to diagnose the true psychic condition of the party, whose incapacity is in question (cf. *coram* Sable, 13 December 1994, in *RRDec.*, vol. LXXXVI, p. 655, n. 13).

In fact, after reviewing all the acts of the cause and, if it is possible, having directly examined the subject, the experts “must explore [...], in accord with the rules of their own science or profession and competence, the existence of a psychopathology or psychic anomaly in the contractant at the time when the marriage began, and indicate its origin, nature, gravity and prognosis” (*coram* Turnaturi, 13 November 1997, in *RRDec.*, vol. LXXXIX, p. 794, n. 12).

Moreover, they must explain, within the realm of their science, under which aspect and in relation to which obligations of marriage to be assumed or fulfilled the anomalies identified had affected the contractant. For the

et testium, haud neglecto iudicio de eorum credibilitate. Pariter, si praesto sint, pensitanda sunt documenta, praesertim medicorum, quae ad rem pertineant.

Praeterea “iudex unius periti vel plurimum opera utatur, nisi ex adiunctis inutilis evidenter appareat” (can. 1680 *CIC*; cf. quoque Instr. *Dignitas Connubii*, art. 203, §1), cum interventus periti necessarius sit ad veram psychicam condicionem dignoscendam partis, de cuius incapacitate contenditur (cf. *coram* Sable, sent. diei 13 decembris 1994, *RRDec.*, vol. LXXXVI, p. 655, n. 13).

Periti enim, pensitatis actis causae cunctis et, si fieri potest, directe inspecto peritando, “explorare debent [...] iuxta regulas propriae scientiae vel artis et competentiae, existentiam psychopathologiae vel anomaliae psychicae in nubente tempore initi matrimonii, eius originem, naturam gravitatemque, prognosim ostendere” (*coram* Turnaturi, sent. diei 13 novembris 1997, *RRDec.*, vol. LXXXIX, p. 794, n. 12).

Praeterea ipsi explanare debent, intra ambitum suae scientiae, sub quonam aspectu et relate ad quasnam matrimonii obligationes suscipiendas seu explendas inspectae anomaliae affecerint nubentem. Inspecta anomalia

anomaly that is diagnosed, is not “the cause of the nullity of marriage,” but it is the source of the alleged incapacity to contract marriage on account of which the nullity of marriage is called into question.

For this reason, the following are suggested to the judge in the Instruction *Dignitas connubii* in order that the judge can effectively use the services of the experts: “[...] the judge is not to omit asking the expert whether one or both parties suffered from a particular habitual or transitory anomaly at the time of the wedding; what was its seriousness; and when, from what cause and in what circumstances it originated and manifested itself.” Furthermore, “[...] in causes of incapacity to assume the essential obligations of marriage, he is to ask what was the nature and gravity of the psychic cause on account of which the party would labor not only under a serious difficulty but even the impossibility of sustaining the actions inherent in the obligations of marriage” (art. 209 §1 and §2, n. 3).

Without a doubt “it is not the task of the expert to provide a canonical judgement”; on the other hand, “it is not the task of the judge to render a psychiatric expert report.” However, the judge “should not accept the conclusions of the expert in a passive way” (*coram* Sable, 15 December 1998, in *RRDec.*, vol. XC, p. 859, n. 10). In fact, before admitting the

enim, ex se, non est “causa nullitatis matrimonii”, sed est origo assertae incapacitates matrimonii contrahendi, propter quam contenditur de matrimonii nullitate.

Quam ob rem in Instr. Dignitas Connubii haec Iudici suggeruntur ut ipse efficaciter perfrui possit opera peritorum: “Iudex a perito quaerere ne omittat an alterutra vel utraque pars peculiari anomalia habituali vel transitoria tempore nuptiarum laboraverit; quatenam fuerit eiusdem gravitas; quando, qua de causa et quibus in adiunctis originem habuerit et sese manifestaverit”. Praeterea proprie “in causis ob incapacitatem assumendi obligationes matrimonii essentielles”, “quaerat quatenam sit natura et gravitas causae psychicae ob quam pars non tantum gravi difficultate sed etiam impossibilitate laboreat ad sustinendas actiones matrimonii obligationibus inhaerentes” (art. 209 §1 et §2, n. 3).

Sine dubio “opus periti non est iudicium canonicum praebere”; altera ex parte “opus iudicis non est psychiatricam peritiam facere”. Attamen iudex “periti conclusiones passivo modo accipere non debet” (*coram* Sable, sent. diei 15 decembris 1998, *RRDec.*, vol. XC, p. 859, n. 10). Ipse enim, antequam relationem peritalem in provinciam canonicam admittat,

expert report into the canonical realm, the judge must explore whether the expert bases his or her conclusions in the acts and proofs, whether he or she has prepared the expert report in accord with the rules of his or her profession, whether he or she adheres to the Christian anthropology, whether he or she has overstepped the bounds of his or her task by pronouncing a decision, which properly pertains solely to the judge.

Therefore, it is appropriately stated in canon 1579, §1: “The judge is to weigh carefully not only the conclusions of the experts, even if they are in agreement, but also the other circumstances of the case” (can. 1579, §1).

Nevertheless, “when giving reasons for the decision,” the judge “must express what considerations prompted him or her to accept or reject the conclusions of experts” (can. 1579 §2).

explorare debet an peritus suas conclusiones in actis et probatis fundet, an peritiam iuxta suae artis regulas exaraverit, an ipse anthropologiae christianae adhaereat, an limites sui muneris ultragrediatur emittens iudicium, quod ad iudicem tantum proprie spectat.

Ideo opportune in can. 1579 §1 edicitur: “Iudex non peritorum tantum conclusiones, etsi concordēs, sed cetera quoque causae adiuncta attente perpendat” (can. 1579 §1).

Utrumque tamen iudex, “cum reddit rationes decidendi”, “exprimere debet quibus motus argumentis peritorum conclusiones aut admiserit aut reiecerit” (can. 1579 §2).

3 – The Argument

9. The supplementary instruction of the cause, which was carried out after our decree of 5 February 2004, undoubtedly yielded strong elements to overcome the main difficulties on account of which, after the decision of the tribunal in first instance of 14 August 2002 was not immediately confirmed, the cause was admitted to an ordinary examination in second grade. For, it is evident either from the new judicial examination of the petitioner, or from those things which were admitted by Matthew himself during the conversations with the expert who was selected *ex officio* in the place of residence of the respondent, or from those things which are at least hinted from the declarations reported in writing by some experts whom the parties had approached “for counselling,” that those things which were declared by the

petitioner and witnesses who were introduced by her, at least with respect to the substance, correspond to the truth, and therefore, they must be accepted for the purpose of making our decision. Moreover, opinions of two more *ex officio* experts have been added, and the first one these directly examined the respondent, while the second one diligently weighed all the elements, which could have been drawn from the testimonies of the parties and of witnesses and from the preceding expert opinions.

Therefore, in order to make our serious decision we must, first of all, review at least summarily the elements that are drawn either from the character of the respondent party or about his behaviour particularly during his relationship with Maria during the pre- and post-nuptial period; and then we must weigh the opinions of experts in order to determine what was, at the time of the wedding, the psychic condition of the respondent and the effects that were flowing out of such a condition at the time.

10. As the respondent himself declared before the second *ex officio* expert, the following details must be noted about his relationship with his family: “Matthew is one of five children. His relationship with his family is unremarkable. He describes his mother as overly involved and his father non-communicative. There was no particular closeness to any of this siblings.”

A certain traumatic event disturbed the respondent from an early age. For, as the petitioner observes, he, who was “an outstanding athlete,” “when he was about 7 or 8, developed a very rare eye disease called Coats Disease. Over several years he slowly went blind in his left eye” and consequently “he had to restrict his sport activities.” The second *ex officio* expert had gathered the following from conversations with the respondent: “He lost total sight in his left eye by the time he graduated from high school. He underwent several surgical procedures over a period of years [...]. This condition caused him embarrassment and forced him to stop playing sports [...]. His being self-conscious of his eye, contributed to his preferring to only be with few people. He learned to play classical guitar instead of sports.”

Although, it is not evident from the acts of the case that the respondent had been cured on account of some psychic disorder or at least because of some grave mental distress, nevertheless several elements are derived from his strange character. For he is described as:

- “An introvert,” although the respondent prefers “to be with someone than alone. He dislikes being amongst a large group of people.” In fact, according to the petitioner and some witnesses, the respondent is, in some way, “antisocial,” because of how he behaved particularly with the relatives of the woman and her friends.

- Prone to psychic “depressions”: he went into this kind of depressive crises from a young age, that is to say, already during the time he had stayed in the seminary, at the time when he lived at the Abby of the Monks of St. Benedict and several times during married life. As the petitioner explains, he was often in “one-week depressions,” during which he “did very little. He laid in bed, rarely ate. He did nothing during these times [...]. He did not read, he did not work, he did not shave, nothing. When he started coming out of the deep depression, he was very wounded and broken. He needed a lot of bolstering.”
- A certain friend of the respondent, with whom he developed a relationship from around 1976, also recalls his “mood swings” during his stay in the seminary, noting: “That were a little scary for some of us”: in fact he was then hiding himself in his bedroom “for days,” and he came out of this only “to go to class.”
- He was absolutely unstable either to establish his “state of life,” or to perform any work. In fact, for some time Matthew was inclined towards the priesthood, for this reason he remained for some time in the seminary; then he stayed at the Abby of the Monks of St. Benedict, because he was feeling himself inclined toward religious life; however, then he decided to contract marriage with Maria, who similarly stayed at the same Abby. During married life “he was experiencing a period of agnosticism,” so that “he did not attend a child’s baptism.” After this, he again fully adhered to the Catholic Church, although following the temporary marital separation initiated by the woman in 1992, he “refused to return to the Mission (i.e., to his own parish) or go to Mass there,” or “he would have nothing to do with the people that had been so much a part of our lives for 12 years,” because, according to him, “they were bad, I was associating with bad people and that was it.” Finally, although he strongly contends for the validity of his marriage, now the man again intends to enter religious life at a certain Abby of Saint Bernard.

The instability of the man with respect to his job performance is especially raised in the testimonies of the petitioner and the witnesses. In short: “He has been through job after job after job, switching careers and professions numerous times.” Furthermore, he “had numerous and, sometimes, extended periods of unemployment where he did not find work, or put much effort into trying to find work.” At least according to the petitioner, the respondent “was unable to stay employed at any one job for any length of time. During our 20 year marriage, there were few jobs that he held over 1 year. He could not get along with co-workers or bosses at his jobs. He was

bothered by noises co-workers would make or reasonable demands that bosses would require of him. He was unhappy working with others.”

Although he may seem to downplay the matter, the respondent in fact admits at least among the difficulties of married life: “I was having difficulty with my career and that was stressful for us.” And he notes: “I was unemployed at the time she decided to separate our family.” Then, from the conversations he had with the respondent, the second *ex officio* expert concludes the following about our question: “His vacillation in employment appears to have been a major contributor to the marital strife [...]. His unemployment was a recurrent problem. Matthew claims that at one point he chose not to work so that he could be available to his children, especially his son who was having behavioral problems [...]. It seems that his inability to cope with stress and frustration contributed to his moving from one job to another.”

Nevertheless, despite his declared right intention, it is evident from the testimonies of the petitioner and her witnesses that the man really assisted little, as far as the substance is concerned, in fulfilling his responsibilities towards children and in fostering family life.

- Altogether obstinate in defending his own opinions and positions. Also with respect to the question of his marriage, although he admits in a generic manner of speaking that he had erred in his behavior, he never raises the question about the nullity of his marriage. He relies on the teaching of the Church according to which the marriage is indissoluble, and therefore, on the necessity of preserving somehow the unity of the family, without considering the necessity of changing his behavior.

Especially according to his obstinate opinions, in fact, he effectively failed to offer help to care for his son, who was diagnosed with: “ADHD” (“Attention Deficit Hyperactivity Disorder”), because he did not accept such a diagnosis and refused to attend the so called “counselling sessions.” Similarly astonishing is the manner in which he refused to attend the celebrations of the marriages of his brother and sister and also “his grandparents’ 50th wedding anniversary celebration.”

Indeed he “has a degree in marriage and family counselling which,” however it “doesn’t seem to fit his personality because he isn’t a people person and seems very rigid in his thinking.”

- Absolutely inflexible and averse to accommodating himself to the positions of others, because “in Matt’s eyes, everything is black and white. There is no gray.”
- He obsessively or fanatically engages subjects of inquiry. About this it is enough to refer to what was declared by a certain friend of the

respondent, with whom he was “in a Roman Catholic Seminary together” between the years 1976-1978: “I’ve already used the term ‘obsessive.’ He would latch on to something and work on it obsessively until he became an expert. Prior to entering the seminary, he had become a classical guitarist. While in the seminary, he spent several months reading everything he could learn on Chess and playing the game with others. He worked zealously learning Greek and Latin, even though these were not required topics at that time. I believe these were escapes for him [...]. He approached things with a kind of fanatic zeal, but then he would drop it and move on to other things.”

- Indeed he was devoted, but only when it was to his advantage, so that, during married life, things would seem to go well for him, while he was really not being aware of the increasing inconvenience of the petitioner and of the family. Among other things, after the birth of his third son, without consulting his wife, he “got a vasectomy,” because he “could not go through having another baby in the house.” On the other hand, the petitioner decided both on temporary separation in 1992, and on definitive separation in 2000, because she considered the thinking and behavior of the man to be absolutely intolerable. On account of this she “has suffered from multiple physical problems,” whereas “when Matt moved out, Gail felt like the weight of the world was off her shoulders and her medical physical problems disappeared.”

11. Furthermore, the declarations of some experts in psychological matters are found in the acts, and these, although they had not dealt directly with the psychological condition of the man, nevertheless they “indirectly” derived at least some elements at a non-suspect time, because they had helped the parties in overcoming worsening conjugal difficulties: from those elements they fully confirmed what was judicially declared by the petitioner herself and by the witnesses.

The first of those experts directly treated the son of the parties, whose name is Matthew. The expert observed that he “was having problems with his aggressive impulsive responses to authorities, which had nearly gotten him expelled from school. He was initially diagnosed as having Attention Deficit Disorder and later was changed to include Oppositional Defiant Disorder.” Nevertheless, while the petitioner “was very active in Matthew’s therapy and motivated to follow advice,” the respondent “did not attend any sessions and was not supportive of the interventions attempted.”

The second expert, who had dealt with the difficulties of the parties in 1990, had especially examined these: “The issues revolved around the fact that Matthew was unable or refused to work. She reported that he suffered

from severe periodic depressions and had very rigid ideas about all areas of life, which he wanted her to believe. Because of this he was unable to bring the emotional and financial support that is part of a dynamic marriage relationship.”

The third expert, who had known the parties “in the early 1980’s,” first as a friend and then as “counsellor,” observed the following: “Maria was having difficulty handling Matthew’s rigid perception, interpretations and time-consuming thoughts. She was concerned in the later 1980’s that Matthew was depressed. Matthew was rigid in his thinking, especially in the areas of interpreting Church law. For him, Church law was based on concrete thinking: black or white. His thoughts were recurrent and persistent; he seem to be compelled to act according to rules that he applied rigidly that it became unreasonable in a sense of ‘normal’ reality. In the later 1980’s, Matthew’s motivation or lack of employment led me to believe he was clinically depressed. I encouraged him to seek counselling.”

12. As is evident, many elements are brought out from the acts of the cause about the difficult character of the man and about his inconsistent behavior, which must nevertheless be weighed by experts in psychic, that is, psychological matter, so that we may be able to come to a decision about the psychological condition in which he was at the time that he had celebrated marriage, and consequently about his capacity or incapacity to contract marriage.

In our case, this is aided by the service of three *ex officio* experts.

13. The first expert, after having carefully weighed the acts of the case which were then available, considered the psychological disorder of the respondent as grave. For, he identified in the respondent, besides “recurrent Major Depressive episodes,” “two Personality Disorders,” namely, “Obsessive-Compulsive Personality Disorder” and “Schizoid Personality Disorder;” and he found indications of each disorder in the declarations of the petitioner and witnesses who were introduced by her.

Indeed, in our decree of February 5, 2004 we presented ourselves uncertain about the conclusions of this expert, observing particularly the following: “The expert has prepared his *votum* based solely on the acts of the cause, in fact solely on the responses expressed in writing by the petitioner and by the witnesses introduced by her, and on a certain conversation he had with the petitioner over the telephone. On the contrary, although his expert investigation concerned the psychic condition of the respondent, the expert refused to conduct a direct examination of the man for this altogether strange reason: ‘A decision not to interview the Respondent was made because his

questionnaire responses showed so little insight into his own behavior or contributions to the demise of the marriage that it was deemed futile to interview him [...]. Anyway, at to what concerns the so-called 'recurrent Major Depressive episodes': it is difficult to understand how such a diagnosis can be attributed to the generic statements of the petitioner and of two witnesses about the so called 'depressive episodes'. According to the petitioner herself, the respondent was intermittently suffering from depressions, which generally lasted a week and receded without Matthew going into any treatment. However, as to the 'two Personality Disorders', the expert himself does not seem morally certain whether the alleged disorders had affected the personality of the man already at the time of the wedding, because he only states: 'both of which (Disorders) were probably present at the time of his marriage'. Moreover, the expert defines the mentioned diagnosis including among the outlines represented in "DSM-IV, 1994," all inappropriate behaviors of the man, drawing them out without any critique from the responses of the petitioner and her witnesses, without taking into consideration when the respondent had behaved in that manner, whether it was a matter of grave indications of the alleged anomaly and whether much of the man's behavior had in fact already progressed at the time of the wedding in line with the dynamics of that anomaly, and without weighing even the guessing according to which the married life really failed probably because of non-pathological reason', that is to say, because of difficulties 'which could be overcome, were it not for their refusal to struggle and make sacrifices' (John Paul II, Allocution to the Roman Rota, 25 January 1988, in AAS, 80 [1988], p. 1183, n. 8)."

Nevertheless, the reported criticisms of our decree of 5 February 2004 must be greatly softened after the instruction of the case was completed thereafter.

14. The second *ex officio* expert prepared his expert report on the basis of his conversation with the respondent, using also two so called "Tests" (namely, the "MMPI-2" and the "Rorschach Inkblot").

After explaining the especial circumstances which had affected the respondent from infancy until his adult age, and after describing the anomalous traits of his personality and his strange behaviors, the expert arrived at the following synthesis: "Mr. Matthew tends to be a perfectionist, he is inflexible about issues of morality and values, and shows signs of rigidity and stubbornness. He prefers to be with few people, though likes to have some people around. He is self-conscious regarding his eye and is sensitive to the opinions of others. While these are all symptoms of the two personality disorders applied to him (about which the first expert had spoken), they

are an insufficient number to adequately meet the criteria for them. I believe, had all information been gathered within its proper context, such diagnoses would not have been applied.” In other words, this expert did not find a true psychic disturbance in the man, but only some indications or signs, that is, “personality traits,” which however cannot be considered the same as grave personality disorders.

The expert confirms the reported conclusions in his responses to the questions which were put to him by Our Apostolic Tribunal, namely: “Mr. Matthew was not found to be suffering from a personality disorder.” “I do not believe that Mr. Matthew did, nor does he now, suffer from a personality disorder. He demonstrates some characteristics which are consistent with symptoms that comprise the diagnostic criteria of such disorders, but there are not sufficient numbers of them to adequately satisfy such a labeling.” Consequently, the diagnosis made by the first expert is not confirmed. Similarly, “I do not believe that Mr. Matthew suffered from anything which would render him unable to fulfill his obligations and duties as a husband.”

As is evident, the second expert, although he admits the indications, that is, the anomalous “personality traits” of the respondent, denies “the gravity” of some of his psychic disorder. Therefore: there is a discrepancy between the two prior experts particularly in regards to defining the gravity of the psychic condition of Matthew and, certainly, in relation to the time when the marriage was celebrated. And in order to resolve this most difficult question, the intervention of a third expert seemed necessary, who was selected from among the experts of Our Apostolic Tribunal.

15. In order to carry out the task entrusted to him by Our Apostolic Tribunal, the third expert first of all reviewed all the acts of the cause (namely, the *libellus*, the testimonies of the parties and witnesses, the *votum* of the expert which was prepared during the first instance of the trial, the expert report of the second expert and even the letters which the man had sent to Our Apostolic Tribunal and to the petitioner). Having all of these elements before his eyes, which could be derived from all of the acts of the cause, the expert of Our Apostolic Tribunal proves that, in this case, the respondent indeed suffered from both “Obsessive-Compulsive Personality Disorder” and “Schizoid Personality Disorder,” adding, therefore, new arguments in order to confirm the diagnosis, which was already determined by the first *ex officio* expert.

Therefore, responding to the questions which were posed by Our Apostolic Tribunal, the third expert declares with “moral and scientific” certitude “that Mr. Matthew presents an Obsessive-Compulsive Personality Disorder (F 60.5-301.4 DSM-IV) and subordinately a Schizoid Personality Disorder

(F 60.1-301.20 DSM-IV).” Similarly, the expert informs us that the personality disorder of the respondent is pre-nuptial, because “the diagnosed anomaly dates back to the age of adolescence.” Furthermore, according to the expert, the psychic disorder of the man is grave, particularly because it constantly interferes with his behavior during the entire married life to this day, particularly with regard to his relationship with the petitioner and with the children. Therefore, despite “the total incapacity of the subject to recognize the more harmful aspects of what, according to his own opinion, is only a character defect,” that is to say, although he was not aware “of not being able to accept, in the continuity of everyday life, the *difference* of the person with whom he intended to live a life of love and communion,” because he was “incapacitated to acknowledge that otherness outside of the total identity with himself.” Indeed, he lacked the capacity to assume “the good of the spouses,” because due to the peculiar nature of his disorder, he was incapable “of responsibly and stably carrying out the contents of the canonical marriage contract, as a dual and equal interpersonal relationship.” Indeed, for the same reason, from his constant behavior, the respondent proved himself incapable “of establishing a strong interpersonal relationship with his own children, towards whom he always alternated between oppressive behaviors to behaviors of open disinterest.”

Finally, expressing his opinion concerning the expert reports which were already in the acts, the expert of Our Apostolic Tribunal fully adheres to the conclusions of the first expert, explaining however that, “recurrent Major Depressive episodes,” from which the respondent suffered both before the wedding or after the wedding, “appear as reactions to stress which confirm the existence of serious personality disorders that have been diagnosed.” On the other hand, he disagrees with the conclusions of the second expert, because he probably did not adequately weigh the gravity of the symptoms because of “the manipulative skills of Mr. Matthew,” while “both in the instruments used by him during the interview session and from the analysis of the MMPI-2 questionnaire, as reported in the expert’s report” there was evidence of “a number of diagnostic elements sufficient to confirm the diagnosis of the previous expert.”

During the session for review of the expert report, the expert of Our Apostolic Tribunal fully confirms both the diagnosis of the psychic disorder of the respondent reported before, and the prenuptial nature of that disorder. Moreover, he further explains the consequences of the alleged disorder, noting the following: “The disorder diagnosed in the respondent [...] does not properly concern the vision of reality, but rather determines a falsification of his contact with others and therefore in the manner he relates himself,” namely, “it is

characteristic of these subjects not to allow any space for the identity of the other, deeming only their own point of view acceptable, and therefore the position and identity of the other not acceptable. Basically, the subject is very fussy about all the things that he needs to do, and specifically with regard to the relationship with reality, the subject stops at particular things, without considering the overall picture of the problem or of the reality.”

The expert confirms the gravity of the man’s personality disorder, which indeed pervaded his entire behavioral pattern during the whole of married life. Indeed he explicitly adds some things to prove that the respondent behaves even to this day according to the particular dynamic of that disorder: “The tone of the letters written repeatedly by the respondent to the Ecclesiastical Court fits perfectly with the characteristics of rigidity and incapacity to admit insofar as it was not considered by him as just, and that is to say they are the characteristics the Compulsive Personality Disorder. In other words, he cannot accept the fact that according to the petition of his wife a judgment could be pronounced on his incapacity: that would be equivalent to saying that he is twisted and this provides justification to the opposing party.” And on the other hand, during this grade of trial, the man presented a request to deal with the cause of separation of spouses, simply because he “does not accept a negative verdict on himself, especially because this verdict was requested by his ex-wife; on the other hand, the request for separation, which would permit him to enter the monastery, would not imply such a negative judgment.” Moreover, the expert of Our Apostolic Tribunal wisely observes that the respondent constantly behaved according to the same dynamic from adolescence whenever he realized that was in circumstances unfavorable to him: “In the face of situations which the respondent was not able to handle according to his own criteria, he abandoned the field. This happened both when he left the seminary, and when he left the monastery and also in successive employment commitments: he was never dismissed nor did he resign, but he just did not go.”

Because of the peculiar nature and gravity of the respondent’s disorder, which “is clearly revealed through what happens in the everyday life of a relationship,” he was *inhabilis* to assume the obligations which essentially flow from the good of the spouses, because “he was not in a position to start a relationship on equal terms with the partner, by not recognizing the identity and therefore the equal dignity and dissimilarity from him.” Moreover, “he behaved similarly in his relationship with the children, which he tried to shape according to his own principles.”

Finally, the expert of Our Apostolic Tribunal appropriately resolved the difficulties in accord with his own opinion about the gravely disordered

psychic condition of the respondent at the time of the marriage. And because of these difficulties the Undersigned Fathers Auditors, without immediately confirming the affirmative sentence of the tribunal of the first grade, had admitted the cause to an ordinary examination in the second grade, by the decree of 5 February 2004.

In light of the extreme diligence, with which the third expert had carried out his function (insofar as he adequately considered all the acts of the cause; he derived from the preceding elements, through a medico-legal discussion, his opinion about the respondent's disordered psychic condition, and indeed in relation to the time when the marriage was celebrated; he appropriately determined the consequences of the disorder he had examined; he effectively resolved the difficulties against his conclusions), his *votum* must be fully accepted for the judicial definition of the present case.

16. After having carefully weighed everything said in law and in fact, We the Undersigned Fathers Auditors of the *Turnus*, sitting for the Tribunal and having only God before our eyes, having invoked the name of Christ, decide, declare and definitively sentence responding to the proposed doubt:

AFFIRMATIVELY, THAT IS, THERE IS PROOF OF NULLITY OF MARRIAGE IN THE CASE ON THE GROUND OF INCAPACITY OF THE MAN RESPONDENT TO ASSUME THE ESSENTIAL MATRIMONIAL OBLIGATIONS; THE SAME MAN HOWEVER IS PROHIBITED FROM CONTRACTING ANOTHER MARRIAGE WITHOUT CONSULTING THE LOCAL ORDINARY.

Given in Rome, at the seat of the Court of the Roman Rota, on the 23rd of April 2009.

Ioannes Baptista DEFILIPPI, *ponens*
Robertus M. SABLE
Aegidius TURNATURI

This judgement is made executive.

**UNIVERSITÉ SAINT-PAUL —
FACULTÉ DE DROIT CANONIQUE
SAINT PAUL UNIVERSITY —
FACULTY OF CANON LAW**

**THÈSES DE DOCTORAT — DOCTORAL THESES
2017**

SAINT-LOUIS, Edwine. Le secret d'office du juge ecclésiastique : Application du canon 1455 du *CIC/83* par rapport au bien commun.
Soutenue 10 mars 2017. Directeur de Thèse : Professeur Michael Nobel.

Le canon 1455 en exigeant des juges et des ministres du tribunal de garder le secret inhérent à leur charge, en tout procès pénal et au contentieux, ou encore quand la révélation d'un acte peut porter préjudice aux parties, s'inscrit dans la même ligne que l'Instruction sur le secret pontifical *Secreta continere*, publiée le 28 février 1974. En tout procès, il en résulte que, la loi du secret d'office est pour le bon ordre de la vie sociale et aussi pour la protection de la dignité de la personne humaine.

Mais comment parler d'une justice équitable, s'il y a des dossiers probatoires, tenus secrets par le juge, et qui ne sont pas révélés à l'autre partie pour qu'elle puisse présenter sa défense ? Et si le juge tient compte de cette information tenue secrète pour rendre la sentence ? N'y aurait-il pas là deux poids deux mesures ? N'est-ce pas une violation du droit de défense ? Et comment vérifier la vérité des faits allégués ?

C'est à ces questions et d'autres que nous nous proposons de donner des éléments de réponse dans cette thèse. Aussi, dans les lignes suivantes, le but principal est de réfléchir sur le traitement des informations reçues confidentiellement par le juge ecclésiastique dans la procédure canonique. À ce but principal, deux autres secondaires sont attachés. Il s'agit de rechercher les possibles raisons de la loi du secret dans le droit canonique, et de faire la lumière sur l'application du canon 1455 du *CIC/83* par rapport au bien commun.

Pour atteindre les buts fixés, le premier chapitre pose la question des formes et des matières du secret en droit canonique. Les deux chapitres suivants, en utilisant les principes de la *ratio legis* et de la *mens legislatoris*, cherchent à interpréter la législation canonique sur le secret d'office du juge ecclésiastique dans l'esprit du législateur. Le chapitre quatre présente la difficile relation entre le secret d'office du juge ecclésiastique et le bien commun. Le dernier chapitre fait une lecture de certaines décisions romaines, en lien avec le secret d'office du juge, pour les procès pénaux, contentieux, matrimoniaux et civils. Quant aux procès civils, une étude de la réception du secret canonique dans certaines législations civiles et certains concordats donne à cette thèse un intérêt qui dépasse la sphère canonique.

AKOTH AWITI, Marren, IBVM, Formation of Women Religious during the Period of Temporary Vows with Particular Reference to the Religious Institute of the Blessed Virgin Mary (Loreto Sisters). Defended 18 April 2017. Supervisor of the Thesis: Professor Wojciech Kowal, O.M.I.

The Church instructs that the formation of religious after first profession, already began in the novitiate is to be perfected so that they may acquire the necessary maturity to lead the life of the institute more fully and to carry out its mission more effectively, mindful of the needs of the Church, mission of the institute and condition of people and times (c. 659 § 1).

Formation after first profession for non-clerical religious is an innovation of Vatican II. The document *Renovationis causam* recognizes the necessity and significance of post-novitiate formation in helping the temporarily professed religious attain the required growth towards maturity necessary for permanent commitment. With the promulgation of the 1983 Code of Canon Law, post-novitiate formation was accorded formal legislation and recognized as an intrinsic aspect of religious life. The Code specifies its aims, dimensions and pedagogy, leaving its structure and duration to be designed by individual institutes. The Church requires that each institute draw up a *ratio* which is structured according to the provisions of universal norms at the same time allowing some latitude for necessary adaptations of aspects which may require revision.

Despite the provisions specified in the universal law together with further directives given in subsequent Holy See documents, formation of religious continues to be a constant challenge to the Church as well as religious institutes. This is due to the constant and rapid changes in human society, in the Church and within religious life itself which create new realities and new

needs. This call on the Church to continuously issue new directives which can respond to the challenges in formation brought about by the new realities. For religious institutes, a major concern is the need to update the formation programme.

This study seeks to establish the extent of conformity in the Implementation of proper law to the universal principles on formation during the period of temporary vows in one particular apostolic women religious institute and the norms and their adaptations in view of changing circumstances and new realities in the Church and in the Institute.

Chapter One traces the evolution of the legislation on formation of lay religious from the 1917 Code, through the Vatican II documents, to the revision and promulgation of the 1983 Code in the context of consecrated life, its identity and role in the Church. Chapter Two gives an analysis of the norms on formation during the period of temporary vows as presented in the 1983 Code and subsequent magisterial documents. Chapter Three treats the principles and structure of formation in the Institute of the Blessed Virgin Mary. Chapter Four focuses on the aspects of the formation programme which demonstrate lack of conformity in their practical application with the principles of universal norms and those norms which require updating as a result of new realities and needs in the Institute, the Church and the world. The chapter offers suggestions for an improved legislation on formation during temporary vows in universal law such as the possibility of revision of certain canons on temporary vows and legislation on a feminine model of formation.

DE LA TAILLE, Alexandre, c.s.j., L'exercice de l'autorité et l'obéissance volontaire dans les instituts religieux : Implications pratiques pour la santé et la sécurité de la personne. Soutenue 31 mai 2017. Directeur de Thèse : Professeur Wojciech Kowal, O.M.I.

Les membres d'un institut de vie religieuse cherchent avec passion à établir des relations fraternelles conformes à l'Évangile. Cependant, la faiblesse de la nature humaine ou le péché sont des obstacles. Ainsi, dans le cadre de l'exercice de l'autorité et de l'obéissance peuvent se glisser des comportements atteignant la santé et la sécurité d'un membre ou de plusieurs.

La présente recherche étudie attentivement l'autorité et l'obéissance dans le c. 501 du Code de 1917, dans les cc. 601, 618, 619 du Code de 1983 et dans les documents de l'enseignement de l'Église sur la vie consacrée postérieurs à 1983. À la suite de cela, elle étudie la manière dont la société séculière à partir du début du xx^e siècle avec la création des grandes

organisations internationales s'est souciée de la santé et de la sécurité des travailleurs. Cela met en évidence qu'un des enjeux de la société du *xxi*^e siècle concerne les risques psychosociaux au travail.

L'étude après avoir regardé la manière dont les cc. 231, § 2 et 1286, 1^o sont appliqués dans différents diocèses, se termine par une synthèse présentant un outil complémentaire pour le gouvernement d'un institut religieux soucieux de mieux prendre en compte la santé et la sécurité de ses membres. Par ce moyen, un institut peut mieux identifier et se prémunir des abus présents en son sein.

TUMUSIIME, Sebastian Zanikire, The Church's Response to Childless Couples in Uganda: Canonical and Pastoral Considerations on Sterility (c. 1084, §3). Defended 9 June 2017. Supervisor of the Thesis: Professor Michael Nobel.

Sterility is one factor which has the potential to disrupt the "partnership of the whole of life" (c. 1055, §1). In both Ugandan and Western societies, couples enter marriage with a strong desire to have children. In Western societies, childless couples seek medical tests and treatment for temporary infertility. Others who do not succeed in begetting children opt for the use of artificial means of reproduction. In developing countries such as Uganda, childless couples seek traditional means of enabling men to have children outside wedlock. It is noted that none of these options is approved by the Church. For this reason, canon 1084, §3, *CIC* 1983 which stipulates that "sterility neither prohibits nor nullifies marriage ..." poses a challenge to apply.

This thesis is an attempt to address the challenge and to make recommendations for the Church in Uganda. The first chapter discusses the development of the understanding of marriage as hierarchically ordered with procreation as the primary end. When the personalist dimension was incorporated into this understanding, procreation became one of the two ends of marriage: the good of the spouses and the good of children. However, in Uganda, procreation remains the primary end of marriage. As discussed in the second chapter, the good of the children is not always attained due to impotence and sterility. Since sterility is not an impediment to marriage, its potential to disrupt marital partnership is brought about by other canonical factors such as error, deceit and condition. These three factors make sterility juridically relevant to the validity of marriage.

With the advancement of science, sterile spouses may seek medical help in order to have a biological child. Out of the scientific means discussed in

the third chapter, the Church accepts NaPro (Natural Procreative) Technology or any other means which treats the symptoms of infertility and enables conception to take place naturally. In the fourth chapter, this work discusses the Church's documents which unequivocally state her stand on sterility and the use of artificial means of reproduction. In order to advance the teaching and legislation of the Church, recommendations are made for the Church in Uganda.

It is hoped that by incorporating sterility in marriage preparation, integration of canon law to local marriage customs, and having functional and accessible tribunal services, it would be possible to address the questions raised by childless couples in the Ugandan context.

LUSABE, Lennoxie N., C.M., An Analysis of Participative Structures in Selected Particular Churches in Eastern Africa in Light of the 1983 Code of Canon Law. Defended 24 June 2017. Supervisor of the Thesis: Professor John A. Renken.

This thesis analyses participative structures in selected particular Churches in the Association of Member Episcopal Conferences in Eastern Africa (AMECEA) region and proposes some concrete means through which active participation of the Christian faithful may be fostered in the participative structures of these Churches.

Structures of participation are means whereby a *communio* ecclesiology finds expression. The 1983 Code provides for a greater number of participative structures in a particular Church in order to reflect *communio*. This study focuses on five of these participative structures: the diocesan synod, the diocesan finance council, the presbyteral council, the college of consultors, and the diocesan pastoral council, treating their nature, purpose, composition, functions, and cessation.

Pope Francis emphasizes the principle of synodality, a constitutive element of the Church, as offering the most appropriate interpretative framework for understanding the Church. For synodality to be a reality, there is an urgent need for the renewal of participative structures. Areas of renewal include: the training of bishops, presbyters, and the laity in servant-leadership skills; intensification of ongoing formation of presbyters; revamped seminary formation programmes based on the *Ratio fundamentalis institutionis sacerdotalis*, 2016; a greater use of the deliberative vote in participative structures; identifying the purposes of the participative structures and making the best use of them.

OBEL, Andrew, The Agreement for Temporary Service of a Diocesan Priest outside His Diocese of Incardination according to Canon 271 of the 1983 Code of Canon Law. Defended 7 September 2017. Co-Supervisors of the Thesis: Professor John Huels, Professor Chad Glendinning.

Canon 271, §1 of the *CIC* calls for an agreement between the bishops *a quo* and *ad quem* for the temporary service of diocesan clerics outside their dioceses of incardination. The purpose of the agreement is to determine and safeguard the rights and duties of the priests and bishops involved. A 1980 document of the Congregation for the Clergy, *Postquam apostoli* provides some of the juridical elements that should constitute the content of such an agreement. This thesis is an in-depth study and investigation of the agreement with the aim of contributing additional canonical elements that need to be included in it to make it reflect the current situation faced by the priests and bishops involved.

To provide the context under which the written agreement originated, the thesis, in its first chapter, traces the history of the law on the movement of clerics from one diocese to another beginning from the early church period up to the *CIC*. It examines the various juridic norms that existed before the *CIC* and observes that throughout its history, the Church has regulated the ministry and movement of clerics by formulating stringent laws that forbade clerics from moving unnecessarily.

In the second chapter, the thesis examines the current law on the temporary service of diocesan clerics outside their dioceses of incardination as stipulated in c. 271. This analysis includes tracing the textual development of the canon and critical analysis of its components.

Chapter three carefully discusses the canonical elements that need to be included in the written agreement, and investigates the contractual, binding and obligatory nature of the agreement. It concludes that the agreement (*conventio*), although not explicitly called a contract (*contractus*), binds the parties involved, and diocesan bishops are obligated to enter it when they welcome foreign clerics to minister in their dioceses.

The fourth chapter is dedicated to the discussion of the drafting process and implementation of the agreement. It analyses eight sample agreements from selected dioceses in Canada, the United States of America and Uganda and highlights the need of drafting the agreement accurately in conformity with the provisions of c. 271 and the pertinent norms of *Postquam apostoli*. The analysis of the sample agreements further adds a practical dimension to the thesis and provides examples that other dioceses can use for drafting their own agreements.

MACLELLAN, Bonnie, csj, Canonical Sponsorship of Catholic Health Care in the Province of Ontario, Canada: How To Retain Catholic Organizational Identity While Delivering Quality Health Care.

Defended 5 December 2017. Co-Supervisors of the Thesis: Professor Francis Morrissey, O.M.I., Professor John A. Renken.

Since Vatican Council II, the question of the appropriate preparation of the laity to assume responsibility for the sponsorship of apostolates in the name of the Church has been a concern both for religious institutes who have participated in the evolution of sponsorship models, and for the laity whose understanding of their call to ministry in the Church following upon their baptismal promises has continued to evolve. The principal question to be answered in this study is: can the various Catholic health care sponsors in Ontario, Canada ensure both the preservation of Catholic identity and the delivery of quality health care within a predominantly secular social and political environment?

This study focuses on Catholic health care in Ontario, and suggests approaches to educate and support canonical sponsors in fulfilling their unique canonical ministry obligations and their contribution to the delivery of quality health care within the province of Ontario. It proposes both internal and external organizational strategies which could facilitate integration of Catholic identity and values at all levels of the organization's structure, and which are based on organizational design and adult education best practice models. Because Canada's health care system has shifted from charitable works to federally mandated and provincially financed and monitored health care systems, an evolutionary and systematic analysis of Canada's health care system and the Catholic health care system in Ontario offer the research design of this study.

It is our hope that this research will assist sponsors within Ontario and in other jurisdictions, as they examine the changing world in which Catholic health care continues the healing mission of Jesus, identifying both negotiable and non-negotiable essential Catholic identity criteria for Catholic sponsorship, and developing collaborative strategies in a pluralistic and secular world, which will support the mission of Catholic health care into the future.

Doctoral theses are available at: <https://www.ruor.uottawa.ca>

RECENSIONS — BOOK REVIEWS

John A. ALESANDRO (ed.), *Penal and Disciplinary Situations Involving Priests and Deacons. What Can Be Done – and How? A Practicum in the Application of Canon Law*, Washington, D.C., Canon Law Society of America, 2017, vi, 203 p. – ISBN 978-1-932208-45-0. US \$30.00.

The Canon Law Society of America offered a seminar on penal and disciplinary situations involving clerics at the Bethany Center, Lutz, Florida, on 31 March-2 April 2014. This book is the proceedings of that seminar, whose purpose is identified in these words: “This workshop was designed principally for canon lawyers who are called upon to advise bishops and other diocesan officials regarding canonical procedures to be followed when addressing situations of clerics, both priests and deacons, whose behavior in and out of ministry calls for disciplinary or penal measures” (p. 1).

The book contains the handouts of the four presenters (John A. Alesandro, Lawrence DiNardo, Frederick Easton, and Thomas J. Green), together with questions of participants and answers of the presenters which relate to each topic. It concludes with a brief bibliography which can direct the reader to further research.

The three-day seminar addressed significant issues related to penalizing and disciplining clergy: (1) canonical rights, obligations, and authority; (2) the preliminary penal investigation (3) the penal process, judicial and extrajudicial; (4) penal precepts; (5) various disciplinary actions; (6) dispensation from the obligations of orders *via gratiosa*; and (7) the three special faculties granted by Pope Benedict XVI to the Congregation for the Clergy.

The book provides two extensive appendices. The first appendix contains the 1980 procedural norms for dispensation from clerical obligations, including celibacy, *via gratiosa*, together with a commentary on the norms and several sample documents. The second appendix offers multiple sample documents for the application of the Congregation for the Clergy’s “Special Faculty III.” (A third one-page appendix lists the seminar participants.)

These proceedings provide a superb overview of canon law on the discipline and penalizing of clergy. Though it contains repeated reference to the USCCB’s *Essential Norms*, the proceedings provide a thorough presentation

of the universal *ius vigens* on these issues, which makes its content valuable everywhere. The book is a *most practical and useful* tool for diocesan officials, canonists, victim assistance coordinators, diocesan civil counsel, advocates for the accused, and others interested in a concise and accurate presentation of canon law governing very difficult and painful situations involving clergy who have failed, often seriously, in maintaining appropriate ministerial behavior. Special attention, of course, is appropriately given to the clerical sexual abuse of minors and vulnerable adults.

All remain deeply grateful to the four presenters of the seminar and to the CLSA for providing these proceedings of the seminar.

MSGR. John A. RENKEN

Éric BESSON (dir.), *Les évolutions du gouvernement central de l'Église. Ecclesia sese renovando semper eadem*. Colloque des 23-25 novembre 2016 à l'occasion des XX ans du Studium de droit canonique de Lyon, Toulouse, Institut Catholique de Toulouse, Les Presses Universitaires, 2017, 367 p. – ISBN 979-10-94360-42-2 – € 22,00.

Ce colloque, le premier organisé par le Studium de droit canonique de Lyon, s'est déroulé sous la présidence d'honneur du cardinal Philippe Barbarin, archevêque de Lyon et modérateur du Studium. Son artisan en a été le P. Éric Besson, directeur dudit Studium. Il souhaitait « concrétiser les liens d'échange et de collaboration avec le monde canonique et universitaire français et romain ». Ce désir a été comblé et au-delà, puisque les intervenants et les participants débordaient largement de double cadre.

La première partie du colloque a permis une mise en perspective historique. D'abord avec l'intervention du professeur Thierry Sol, de l'Université pontificale de la Sainte-Croix, sur « La réorganisation du gouvernement central de l'Église de la chute des États pontificaux à la constitution *Sapienti Consilio* de saint Pie X (1908) » (p. 17-44), c'est-à-dire à une époque où la Question romaine n'est pas encore résolue. La notion de *societas perfecta* a permis de passer d'un monde autonome et souverain à un monde soumis — relégué au Vatican — « sans changer de paradigme canonique, mais en changeant le contenu de cette *societas*, en la spiritualisant et en la rendant susceptible de s'appliquer désormais à un État sans territoire ». La réorganisation du gouvernement central se fait en lien étroit avec l'ecclésiologie et le droit canonique, servant de catalyseur à l'ecclésiologie à venir du concile Vatican II.

Le doyen Patrick Valdrini, professeur à l'Université pontificale du Latran, présente, pour sa part, « La Curie romaine, permanence dans le service et

évolution dans le temps » (p. 45-58), soulignant qu'aucun pape ne s'est senti tenu de conserver l'organisation de l'Église telle qu'elle se présentait au moment de son élection. L'instrument qu'il a promu « a toujours servi une conception ecclésiologique de son action, par exemple centralisée [...] ou, à l'inverse, respectueuse de la constitution de l'Église catholique qui unit les deux réalités d'Église universelle et d'Églises particulières à l'image de la primatie que sert la Curie ».

La deuxième partie portait sur des perspectives ecclésiologiques. Le professeur Gianfranco Ghirlanda, S.J., de l'Université pontificale Grégorienne, pose « les fondements anthropologiques et ecclésiologiques du droit ecclésial » (p. 59-94). Il entend montrer qu'à l'origine de chacune des lois, comme de tout le système juridique ecclésial, « il doit y avoir une connaissance pré-requise — dans un regard de foi — de l'homme régénéré dans le Christ, devenu membre de l'Église et soumis à la loi intérieure de l'amour, mais aussi des structures institutionnelles de l'Église voulues par le Christ lui-même ». Il affirme que « le droit ecclésial, conçu comme ensemble des lois de l'Église, s'insère dans la dynamique de l'annonce de la foi, du fait qu'il communique des contenus de foi ».

« Primauté, collégialité, synodalité » (p. 95-110) sont trois concepts précisés par Mgr Roland Minnerath, archevêque de Dijon. Il montre que la synodalité est fondamentalement un concept de l'ecclésiologie et du droit canonique orientaux, et qu'elle est « une réalité sacramentelle eucharistique au niveau local, où elle implique tous les membres du corps du Christ, chacun selon sa mission, clercs et laïcs ». D'autre part, l'antériorité, ontologique et chronologique, de l'Église universelle « est un clé pour la compréhension de la relation entre primauté et collégialité. Le ministère du successeur de Pierre appartient à l'Église universelle » et est en même temps « intérieur à toute Église particulière ». Sans superposer indûment collégialité et synodalité, il convient de relever que toutes deux « convergent, au niveau universel, vers le concile œcuménique ». Si le gouvernement de l'Église particulière comme celui de l'Église universelle mettent toujours en œuvre la primauté, de nos jours celle-ci « ne peut plus être détachée de la collégialité ni de la synodalité ».

Le P. James J. Conn, S. J., du Boston College, présente alors « le pouvoir législatif des conférences épiscopales » (p. 111-130). L'auteur relève six cas où les normes du code permettent aux conférences des évêques de déroger à la loi universelle, dix autres où elles peuvent promulguer des lois particulières et vingt autres où elles peuvent prendre des normes en vue de mieux préciser ou appliquer le droit universel. Il passe alors divers secteurs en revue : liturgie, *prænotanda* des livres liturgiques, mobilité, fait culturel,

échelon national, finances, relations Église-État, pluralisme religieux, importance de projets communs. Il mentionne ensuite les cinq moyens prévus par le directoire *Apostolos suos* grâce auxquels une conférence des évêques « remplit une fonction importante dans toute sorte de domaines pastoraux ». Il termine en faisant cinq observations principales.

Le P. Éric Besson intervient à propos de « l'œcuménisme et l'Église catholique : le cas des ordinariats pour les Anglicans » (p. 131-162). Après avoir présenté l'origine, la nature et le fonctionnement de ces ordinariats personnels, statistiques à l'appui, l'auteur formule quelques réflexions, présentant d'abord les similitudes avec d'autres communautés hiérarchiques personnelles, mais aussi leurs différences, discutant notamment du mode d'incorporation dans l'ordinariat. Dans un deuxième temps, le P. Besson envisage l'impact de la création de ces ordinariats sur le mouvement œcuménique. Le fait que le primat anglican ait signé une déclaration commune avec l'archevêque de Westminster affirmant que l'Église catholique ne modifiait pas son attitude sur l'œcuménisme pouvait rassurer, sans lever les interrogations de tous les Anglicans. Le point le plus discuté a été celui du « patrimoine spirituel anglican » présenté comme un don de Dieu à toute l'Église et une contribution à la foi commune. Une question délicate est celle du financement des ordinariats quant au personnel et aux bâtiments. Un travail pastoral de patience et d'explication s'impose.

Nous abordons alors la troisième partie du colloque, de loin la plus longue, destinée à fournir « divers aperçus d'évolution dans le gouvernement central de l'Église ». Et d'abord « les évolutions de l'action du Saint-Siège dans l'accompagnement des centres d'enseignement » (p. 163-177), conférence prononcée par Mgr Angelo Vincenzo Zanni, secrétaire de la Congrégation pour l'éducation catholique. Après avoir rappelé l'histoire de son dicastère, l'auteur en énumère les fonctions et souligne quelques orientations récentes : identité et mission des institutions scolaires et des universités catholiques, les divers acteurs qui y sont impliqués à divers titres, formation des formateurs (dirigeants et enseignants), nouveaux défis à affronter et perspectives de travail. Comme le pape François le souligne, il importe de reconstruire le pacte éducatif entre la famille, l'école et la société.

« L'accompagnement de la vie consacrée par l'Autorité suprême de l'Église après Vatican II » (p. 179-204) est décrit par le P. Loïc-Marie Le Bot, o.p., de l'Institut Catholique de Toulouse. Après avoir rappelé les principes « qui irriguent » l'accompagnement, le décret *Perfectæ caritatis* et la constitution *Ecclesiæ Sanctæ*, le code de 1983 et l'exhortation *Vita consecrata*, l'auteur passe à la mise en œuvre de l'accompagnement, terme qui lui semble bien choisi et adapté à la réalité, accompagnement assuré par la

Congrégation pour les instituts de vie consacrée et les sociétés de vie apostolique, dont l'activité ne se dément pas au cours des années. Ce souci d'accompagnement et de contrôle « repose sur une justification théologique profonde, puisque la vie consacrée constitue une manière intégrale de rejoindre la sainteté et une manière spécifique de manifester la vie de l'Église ».

Le professeur Astrid Kaptijn, de l'Université de Fribourg, considère le sujet suivant : « Primauté et synodalité dans les églises catholiques orientales ; peuvent-elles encore évoluer ? » (p. 205-225). L'auteur entend adopter une démarche originale, en identifiant les compétences « qui relèvent du *protos* d'un côté, et celles qui appartiennent aux synodes, de l'autre, afin de saisir leur interaction ». Et ce, en prenant le type de gouvernement de l'Église patriarcale comme exemple, puis en abordant ces concepts du point de vue de la relation entre les Églises patriarcales et le Pontife romain. L'auteur est d'avis que le rapport entre les attributions du patriarche et les compétences notamment du synode des évêques de l'Église patriarcale semble bien équilibré. À l'échelon du Pontife romain, il devrait être possible d'améliorer les procédures de désignation des évêques.

Il revenait au cardinal Francesco Coccopalmerio de présenter « la structure et l'activité du conseil pontifical pour les textes législatifs » dont il préside les travaux (p. 227-246). Il articule son propos en trois points : la Curie romaine existe pour aider le pape ; les activités par lesquelles le conseil pontifical pour les textes législatifs aide le Pontife romain ; enfin comment traduire aujourd'hui de façon satisfaisante les compétences et les activités du conseil pontifical ? *In fine*, Son Éminence présente les activités de promotion de la connaissance et de la pratique du droit canonique, avec le Centre de documentation du dicastère, les contacts avec les conférences des évêques lors des visites *ad limina*, et les relations avec les canonistes dans le monde entier.

Mgr Franz Daneels, o.præm., secrétaire émérite du Suprême tribunal de la Signature apostolique parle de « plusieurs compétences, un dicastère : le Tribunal suprême de la Signature apostolique » (p. 247-263). La Signature trouve son unité dans le fait qu'elle prend soin de l'observation de la loi dans les procès judiciaires, dans le contentieux administratif et dans sa fonction administrative concernant les tribunaux ecclésiastiques. « Qu'elle prenne soin de la loi, c'est-à-dire de la légitimité, ne signifie pas du tout qu'elle défend la loi pour la loi elle-même, mais qu'elle défend la loi afin de protéger la justice ». Le débat a permis d'apprendre un principe non écrit d'après lequel celui qui adresse un recours auprès de la Signature doit se pourvoir d'un avocat romain, faute de quoi son recours ne soit pas admis. Cela ressemble fort à un déni de justice.

« La gestion des biens temporels du saint-siège : évolutions et fidélité à un service » (p. 265-281) est le vaste domaine débroussaillé par le professeur Olivier Échappé, de l'Institut Catholique de Paris. Il présente les raisons ayant amené à remanier profondément ces dernières années une organisation des affaires financières du saint-siège en place depuis fort longtemps : difficultés financières récurrentes, lutte contre le recyclage de « l'argent sale » ; mais aussi l'organisation patrimoniale et économique non plus de la seule Cité du Vatican mais du saint-siège lui-même. L'auteur souligne le poids croissant des principes et des techniques séculières dans la vie administrative de l'Église.

Le professeur Anne Bamberg, de l'Université de Strasbourg, traite de « questions autour de la vigilance de l'Autorité Suprême sur les Églises particulières » (p. 283-304). Elle s'arrête aux cas des monastères « pas comme les autres », car *sui iuris*, de l'enseignement labellisé catholique, de la préservation de l'identité catholique des associations et des œuvres caritatives à la suite du motu proprio *Intima Ecclesiae natura*, de 2012. Mme Bamberg se penche ensuite sur l'argent et les biens ecclésiastiques, d'abord le contrôle sur le patrimoine du Siège apostolique, puis la transparence dans les finances de la vie consacrée et la surveillance du coût des causes des saints. Un troisième point a trait à la mise en œuvre des normes processuelles : vigilante insistance *versus* faible réception des normes sur les *graviora delicta*, tribunaux en dérive, ce qui se traduit par la non-application systématique de certains canons, surtout de ceux qui concernent la protection de la défense, la publication des actes et celle de la sentence.

Hors colloque, nous avons la contribution du P. Georges Ruysen, S.J., de l'Institut pontifical oriental, sur « les mariages mixtes catholiques-orthodoxes dans le droit canonique » (p. 305-335). Les fidèles orthodoxes qui épousent des catholiques ne sont pas exemptés du droit canonique catholique, qui s'applique quand un seul des futurs conjoints est catholique. Mais ils demeurent assujettis à leur propre discipline orthodoxe « pour autant que celle-ci ne soit pas en contradiction avec le droit divin ». Quand des fidèles orthodoxes introduisent une cause de nullité matrimoniale auprès des tribunaux catholiques, il faut appliquer non seulement la législation orthodoxe à laquelle les parties étaient tenues au moment de la célébration, mais également la législation catholique sur les empêchements et les vices ou défauts de consentement enracinés dans le droit divin.

Une dernière contribution provient du professeur Péter Szabó, de l'Université Pázmány Péter de Budapest sur « les normes 'de *suprema ecclesiae auctoritate*' (CCEO, cc. 42-54) peuvent-elles être reformulées ? Quelques brèves réflexions à partir d'une proposition de la Congrégation pour la

doctrine de la foi alors présidée par Joseph Ratzinger, pour la codification orientale » (p. 337-360). Une reformulation de ces canons, plus attentive à la vision ecclésiologique orientale, est *possible* et *opportune*. Elle suppose une compréhension approfondie, une relecture, de la doctrine dogmatique de Vatican II, à savoir la juridiction suprême et universelle du Pontife romain et son infaillibilité pontificale. La question se pose d'une synodalité « à deux rythmes », c'est-à-dire la possibilité de « représenter » juridiquement l'épiscopat au moyen de groupes d'évêques plus restreints.

Dominique LE TOURNEAU

Alphonse BORRAS, *Quand les prêtres viennent à manquer. Repères théologiques et canoniques en temps de précarité*, Paris/Montréal, Médiaspaul Éditions/Médiaspaul, 2017, 206 p. – ISBN 978-2-7122-1441-8 – € 17,00.

L'auteur de ce livre, canoniste et théologien de renommée internationale, a beaucoup réfléchi et écrit sur le sujet des ministères, des nouveaux ministères, de la paroisse, tant du domaine de la pastorale que du droit canonique. Il incite les lecteurs à une réflexion plus profonde sur « l'Église de demain » alors qu'elle est confrontée à une diminution du nombre de prêtres. Le monde et la société évoluent, changent; l'Église – pasteurs, théologiens, canonistes, tous les fidèles quoi — doit réagir à ces bouleversements majeurs, discerner et trouver de nouveaux moyens de communiquer l'Évangile. C'est un sujet qui fait surgir beaucoup d'émotions, lesquelles doivent être écartées pour l'instant afin de susciter une réflexion courageuse sur des questions qui doivent nous préoccuper.

Le premier chapitre, en toile de fond, présente les constats et les interprétations de la pénurie de prêtres en Europe occidentale et en Amérique du Nord et les pratiques en cours dans les communautés. En reprenant l'inventaire tiré d'un ouvrage néerlandais publié en 1995, il énumère certaines solutions plus classiques au manque de prêtres, qu'il soit relatif ou absolu : la nouvelle répartition des prêtres, l'ordination d'hommes d'âge mûr, la coresponsabilité des laïcs, le rétablissement du diaconat permanent, le regroupement des paroisses et la célébration des assemblées dominicales en l'absence de prêtres (ADAP) ou « assemblées dominicales autour de la Parole », terme que préfère l'auteur. D'autres pistes, plus audacieuses, n'en sont qu'au stage de la discussion ou sont muettes : le fractionnement du ministère sacerdotal en une pluralité de ministères ordonnés, l'ordination de *viri probati* et l'ordination des femmes. Le manque de prêtres est-il un manque réel, une perception issue de la représentation du prêtre-qui-fait-tout, ou est-il plutôt l'occasion de « tabler sur

l'Église locale diocésaine [...] pour forger un « nous des chrétiens » », miser sur la capacité de tous les fidèles pour continuer la mission (p. 50) ? En d'autres mots, faut-il « combler ou habiter » le manque de prêtres (p. 28) ?

Les deux autres chapitres répondent à cette question fondamentale en offrant des repères théologiques et canoniques pour affronter la pénurie de prêtres.

Théologiquement, les repères se trouvent dans la communauté ecclésiale qui exerce sa mission au cœur du monde par l'action de tous les baptisés. Cela demande une relecture de la mission évangélique des communautés et une redécouverte de la pluriministèrialité.

Puis, « enraciné dans la conviction que l'Église n'est pas une société qui prend forme de communion, mais une communion qui prend forme de société » (p. 97), l'auteur dégage des repères canoniques pour pourvoir au manque de prêtres, principalement en fonction de la réalité paroissiale. (1) La territorialité de la paroisse se définit davantage aujourd'hui par les paroissiens qui s'y retrouvent que par les limites géographiques. (2) En plus de la paroisse, il existe maintenant des « pôles paroissiaux », des lieux où s'exerce aussi la mission chrétienne au sein du diocèse. (3) La *cura animarum* est la coresponsabilité baptismale de tous, alors que le curé assume la *cura pastoralis* de la communauté au nom de l'Église. (4) Le manque de prêtres ne doit pas inciter à négliger l'importance de l'idonéité des personnes pour une charge ou une fonction dans l'Église et de la lettre de mission. (5) Le curé doit pouvoir dégager les collaborations possibles à la charge pastorale de la paroisse, par exemple les équipes d'animation pastorale, expression de la *cura animarum* assumée par les paroissiens, et les « équipes de proximité » qui assurent une présence évangélique localement « à quiconque » ; il lui reviendra aussi d'en coordonner le travail, de l'articuler, de le stimuler et de le promouvoir, en s'adjoignant des personnes idoines. (6) Le canon 517 du Code prévoit déjà confier la charge pastorale à une équipe de prêtres *in solidum* ou la participation à la charge pastorale à une équipe de diacres ou de laïcs. (7) Le conseil paroissial de pastorale devrait modeler sa composition et son rôle sur le conseil diocésain de pastorale. Il devrait tenir lieu de « bon conseil » pour le curé, refléter la diversité des fidèles et dépasser les aspects opérationnels de la paroisse ; son rôle en est plutôt un « de discernement évangélique et d'orientation pastorale » (p. 147).

Dans un dernier chapitre, l'auteur offre des mises en garde contre des pratiques en cas de précarité absolue de prêtres : la généralisation de l'application du canon 517, § 2 ; la généralisation de l'office des coordinateurs qui risquerait de « désacramentaliser » la direction de l'Église ; le recours aux prêtres « venus d'ailleurs » sans opérer un discernement qui va au-delà des qualités humaines

et spirituelles et qui porte sur leur aptitude à s'inscrire dans leur nouvelle communauté; le recours aux diacres permanents comme des « substituts aux prêtres » qui risque de mettre à mal l'identité ministérielle du diaconat; l'ordination presbytérale des *virī probati* qui pourrait affaiblir la règle du célibat sacerdotal (on pourrait envisager plutôt la dispense que la modification de la discipline de l'Église latine). L'auteur est d'avis que même si l'interrogation critique quant à l'ordination presbytérale de chrétiennes n'est peut-être pas terminée, le remède à une pénurie absolue de prêtres ne s'y situe pas.

Ce livre, d'une lecture agréable, comme d'ailleurs toutes les œuvres de l'abbé Borrás, est original, cohérent et progressiste. En tant que canoniste, j'ai apprécié la critique des repères suggérés — non seulement théologiques, comme il est trop souvent le cas, mais aussi canoniques. L'auteur est d'abord et avant tout un pasteur, mais il sait si bien donner au droit canonique le rôle vivant qui lui est dû, soit servir d'instrument d'évangélisation.

Anne ASSELIN

Markus GRAULICH (ed.), *Zehn Jahre Summorum Pontificum: Versöhnung mit der Vergangenheit – Weg in die Zukunft*, Regensburg, Friedrich Pustet, 2017, 191 p. – ISBN 978-3-7917-2872-8 – € 22,00; E-Book 978-3-7917-7136-6 (PDF) – €17,99.

In 2007, Pope Benedict XVI promulgated the Apostolic Letter *Summorum Pontificum* (SP), which allows a wide use of the *Missale Romanum* and other liturgical rites of 1962 (newly termed the “extraordinary form” of the Roman Rite). This edited volume, published ten years after the *motu proprio*'s promulgation, contains five essays dealing with various dimensions and implications of this law and related theological and pastoral issues.

The editor, canonist Markus GRAULICH, is Undersecretary of the Pontifical Council for Legislative Texts. He authors the first chapter of the book with a study on canonical aspects and issues, first rehearsing the juridical developments since Vatican II and then offering an overview of both SP and the 2011 Instruction *Universae Ecclesiae* of the Pontifical Commission *Ecclesiae Dei*. Next follows the heart of the article, the text of SP and a detailed commentary which draws on the insights of authors writing in the major canonical languages as well as the norms of the 2011 Instruction. On the perplexing question of what Pope Benedict meant when he asserted that the 1962 Roman Missal was “never abrogated,” the A. sides with the position of this reviewer who has maintained (in *The Jurist* 42:94) that the pope was referring to the Missal as such, not the freedom to use it, which freedom had in

fact been abrogated by Paul VI in 1969. The closing section of the A.'s commentary addresses the implementation of *SP*, drawing on statistics sent by conferences of bishops in 2010 to the Commission *Ecclesia Dei*. In the USA, for example, 378 locations (now about 500) were reported regularly to have a Sunday Mass using the 1962 Missal. Some problems have also been noted by bishops' conferences, such as the lack of sufficient priests with the necessary formation for the celebration of the extraordinary form.

Cardinal Kurt KOCH, President of the Pontifical Council for the Promotion of Christian Unity and former professor of dogmatic and liturgical theology, contributes the next essay. He develops the idea that *SP* not only is an act of reconciliation within the Catholic Church, but that it can also be taken as an "ecumenical bridge" between the Church and other Christian confessions.

The following chapter, by theologian Ralph WEIMANN, is a reflection loosely based on the theme *lex orandi – lex credendi*. He surfaces certain problems in the period of the postconciliar liturgical reform which to some extent are remedied by *SP*.

In a well-researched study, liturgist Stephan KOPP takes as a starting point Vatican II's declaration that "Holy Mother Church holds all lawfully recognized rites to be of equal right and dignity" (SC 4). After ten years, he believes that most of the worries about *SP* have not been realized, but some real problems remain, not the least being the principle of the active participation of the faithful in the liturgy, which was not new with Vatican II but was emphasized repeatedly in papal law and teaching since Pius X.

Uwe Michael LANG, editor of the liturgical journal *Antiphon*, authors the final study on sacramental concelebration, addressing in particular the misconception that all priests present at a concelebrated Mass are required to vest and concelebrate. After developing the historical and theological background, the A. shows that such a requirement is not found in the liturgical laws and is contrary to the Code, which allows priests the freedom to concelebrate or celebrate individually at another time (c. 902). He then raises some practical problems with concelebration, especially with large numbers of priests, which problem was also treated in Guidelines issued in 2014 by the Congregation for Divine Worship and the Discipline of the Sacraments.

This attractive book will be of greatest interest to liturgists, canonists, and students in these disciplines. The scholarship of the five authors is uniformly of high scientific value. The work is dedicated to Pope Benedict XVI for his ninetieth birthday.

John M. HUELS

Héctor FRANCESCHI e Miguel A. ORTIZ, *Ius et matrimonium II. Temi processuali e sostanziali alla luce del Motu Proprio Mitis Iudex Dominis Iesus*, Subsidia Canonica 21, Roma, Pontificia Università della Santa Croce, Facoltà di Diritto Canonico, 2017, 509 p. – ISBN 978-88-8333-656-0 – € 35,00.

Ce volume est une importante contribution à la mise en application des dispositions du motu proprio *Mitis Iudex Dominis Iesus*, publié le 8 septembre 2015. Treize experts renommés en la matière apportent leur pierre spécifique à l'édifice. À commencer par le cardinal Dominique Mamberti, préfet du tribunal suprême de la Signature apostolique, qui analyse « la science canonique face à la loi réformant les procès de nullité matrimoniale » (p. 16-24), à partir des critères d'interprétation que sont le texte de loi, son contexte et des critères subsidiaires, ainsi que l'attitude de l'interprète, son empathie, son orthodoxie, la continuité et sa façon d'appliquer la loi.

Le professeur Joaquín Llobell se prononce « au sujet des motifs du m.p. *Mitis Iudex* et de son insertion dans le système des sources » (p. 25-64). Il passe en revue l'ensemble des documents concernés, c'est-à-dire non seulement les deux motu proprio *Mitis Iudex Dominus Iesus* et *Mitis et Misericors Iesus*, mais aussi les documents pontificaux ultérieurs ainsi que ceux émanant de la curie romaine. Il s'arrête un instant sur la miséricorde destinée à favoriser la rapidité des procès, mais non la nullité des mariages, et souligne la « révolution copernicenne » réalisée par les motu proprio, dont une conséquence est de renforcer l'exercice personnel du pouvoir judiciaire par l'évêque diocésain. Il s'impose de former ceux qui doivent intervenir dans les procès, à commencer par les évêques, nécessité qui comporte une grave obligation de conscience et ne peut rester un vœu pieux. La « Diaconie de la justice », dont la constitution est à l'étude, devrait y contribuer.

Marinio Mosconi, chancelier de la curie de Milan étudie « la phase préalable à l'introduction du libelle et la consultation technique » (p. 65-97), soulignant la responsabilité des conjoints dans cette phase préalable. L'aide apportée à l'exercice de leur responsabilité par les conjoints en vue d'introduire les causes de nullité est un service qui doit être rendu « dans le cadre de la pastorale matrimoniale diocésaine unitaire ». L'auteur s'interroge pour savoir jusqu'où doit aller l'enquête préalable au procès. Il détaille ensuite le service juridico-pastoral apporté aux conjoints et son rapport avec le conseil technique.

Le doyen du tribunal de la Rote de la nonciature en Espagne, Mgr Carlos Morán Bustos, présente de façon très détaillée « les critères d'organisation des tribunaux et les critères d'action des agents juridiques après la promulgation du m.p. *Mitis Iudex* » (p. 97-177). Il estime que, pour actualiser les

potentialités des nouvelles normes, « il devient indispensable de descendre du domaine législatif au domaine du gouvernement et de l'organisation judiciaire, ce qui doit être fait sous la direction et l'impulsion des Pasteurs de l'Église qui ont le devoir de veiller à ce que la praxis juridico-processuelle se développe selon les critères de 'bien agir' et 'devoir être' ». La « conversion des structures » juridico-pastorales entraîne que les évêques s'engagent dans l'administration de la justice et que le juge soit plus proche du justiciable. L'organisation des tribunaux doit répondre à sept critères déontologiques : 1) chercher la vérité selon des critères juridiques ; 2) respecter la loi et la jurisprudence ; 3) se former et agir selon la science et la conscience ; 4) maintenir et respecter la dignité et la réalité professionnelles ; 5) maintenir indépendance et liberté ; 6) agir avec diligence et célérité ; 7) vivre le ministère judiciaire comme une vocation et agir avec probité morale et une vie honnête.

Mgr Pedro A. Moreno, juge au même tribunal, examine la figure du « défenseur du lien après la promulgation de MI » (p. 179-217), et propose six conclusions et points *de iure condendo* : 1) l'application du défenseur du lien dans le procès canonique est décisive pour le bon exercice de la fonction judiciaire et pour la qualité de la sentence ; 2) elle pourrait se traduire par l'obligation de sa présence du début à la fin du procès, sous peine de nullité ; 3) un moyen utile pour éviter la *deceptio Ecclesiae* et pouvoir alléguer l'exception de *res iudicata*, selon le principe juridique *ne bis in idem*, pourrait être de créer un registre des causes à la conférence des évêques ; 4) l'indépendance des défenseurs du lien doit être garantie par la vigilance de la Signature apostolique sur les tribunaux ecclésiastiques ; 5) la suppression de la poursuite simplifierait l'appel ; 6) il serait utile que la Rote romaine publie au moins une partie de ses *animadversiones*.

Le professeur Miguel A. Ortiz étudie « les déclarations des parties et l'évaluation prudente de leur force probatoire » (p. 219-277). Il relève d'abord un « optimisme gnoséologique » proposé par le magistère à l'encontre d'une vision pessimiste qui renonce à la possibilité de parvenir à la vérité et contre la « dictature du relativisme ». Il faut affirmer qu'il est possible de connaître tant la vérité sur le mariage que la vérité de la situation matrimoniale concrète soumise à l'examen du tribunal. Autrement, l'on court le risque de déclarer des nullités insuffisamment prouvées, à partir de la présomption que la plupart des mariages qui ont échoué sont nuls. L'auteur examine les canons 1536 § 2 et 1679 du CIC revus par *Dignitas connubii* et par *Mitis Iudex*, qui instaurent un nouveau concept de « confession ». Puis il se demande quand les déclarations des parties peuvent constituer une « preuve plénière » et quelle doit être la qualité de l'interrogatoire pour une

juste appréciation des déclarations des parties. « Valeur des déclarations des parties et présomption de leur sincérité, appréciation libre et prudente du juge et conviction ou certitude excluant une doute raisonnable de la nullité, ce sont autant d'expressions du principe fondamental du droit matrimonial canonique, la faveur dont jouit le mariage, qui comporte la présomption de la validité de l'union légitimement célébrée par des personnes dont la dignité exige que soient reconnues leur capacité et la sincérité de tout ce qu'elles ont fait ou dit au moment de la célébration ».

Le vicaire judiciaire du tribunal ecclésiastique de la région Trieste-Vénétie, Mgr Adolfo Zambon, traite de « l'évaluation de l'expertise » (p. 279-308). L'expert doit suivre les critères factuel, anthropologique et méthodologique. Parmi d'autres points traités par l'auteur, il souligne qu'il est particulièrement important que l'expert, puis le juge, disposent de tous les éléments nécessaires pour reconstruire le parcours de la personne retenue incapable ; que le juge réalise un travail en amont pour être en mesure d'apprécier correctement l'expertise. Il convient également de tenir compte du critère de proximité des fidèles, ce qui implique pour eux la possibilité d'accéder au tribunal, l'emploi d'un langage compréhensible pour eux.

« L'appel dans les causes matrimoniales » (p. 309-338) est traité par le professeur Carmen Peña García, qui envisage d'abord l'abrogation de l'obligation de la *duplex conformis* et le droit d'appel, puis le *ius appellationis* et la stabilité de la sentence dans les causes de nullité matrimoniale, la présentation de l'appel, la poursuite de l'appel, les particularités de la procédure d'appel, et l'appel dans le procès bref. Si le recours en appel a été valorisé par la réforme évoquée, il importe que la doctrine et la pratique judiciaire fournissent une interprétation correcte des points obscurs du motu proprio.

Le professeur Paolo Bianchi précise « les critères d'acceptation du « *processus brevior* » » (p. 339-366). Une condition préalable est que la rupture irréparable du *consortium vite* matrimoniale soit manifeste. Mais la seule volonté des parties ne suffit pas à activer le procès bref, car les deux conditions du canon 1683 de *Mitis Iudex* sont indissociables. Il faut aussi que la qualité manifeste de la nullité ou son évidence existe *in limine litis*, en tant que certitude morale. Les circonstances indiquant la qualité manifeste de la nullité devront être épaulées par des témoignages et des documents. Quelle est la licéité et la valeur de déclarations écrites jointes au libelle ? Quant aux documents, certains excluent les documents notariés antérieurs, les rapports de détectives privés, les courriels ou les expertises privées. L'on sera attentif à la qualité des preuves générales sous forme informatique. Il faut enfin que soit exclue la nécessité d'ouvrir une enquête ou une discussion plus

approfondie. L'auteur se demande s'il est opportun que ce soit le vicaire judiciaire qui préside le procès bref au nom de l'évêque diocésain.

Felipe Heredia, juge au tribunal apostolique de la Rote romaine décrit « l'instruction et la décision dans le *processus brevior* » (p. 367-389). Ce n'est pas à l'évêque diocésain d'instruire la cause. Il intervient au moment de la décision finale, devant parvenir à la certitude morale de la nullité. L'auteur passe successivement en revue les normes qui réglementent l'instruction de la cause, les présupposés nécessaires à l'instruction de la cause, l'audience pour réunir les preuves, la discussion de la cause, la décision du cas, le recours et l'exécution de la sentence.

« La préparation au sacrement de mariage » (p. 391-404) est traitée par le professeur María Brancatisano Manzi, de l'Université pontificale de la Sainte-Croix, d'abord quant aux bénéficiaires de cette préparation, à partir d'une anthropologie duale homme-femme, telle qu'elle figure dans l'Écriture, l'homme et la femme possédant la même valeur, le même pouvoir, le même amour, alors que l'identité masculine et l'identité féminine présentent des particularités. L'*una caro* est l'unique façon de vivre ensemble. Il est brièvement question ensuite des personnes chargées de préparer au mariage.

Le professeur Giacomo Bertolini, de l'Université de Padoue, s'intéresse aux « évolutions doctrinales et jurisprudentielles récentes et moins récentes au sujet du rapport entre intention sacramentelle et mariage » (p. 405-475). Il souligne qu'il n'est pas clair dans les débats actuels si l'objet de l'analyse est l'intention sacramentelle externe ou interne, ou bien celle du *suscipiente* ou celle du ministre, car elles sont toutes les quatre présentes dans un mariage ; ni si par « foi » il faut entendre l'*habitus fidei*, ou la *fides qua*, voire la *fides quæ*. Après avoir dressé le *status questionis*, l'auteur fait « une lecture raisonnée » des sources récentes, mentionne les apories contemporaines, précise l'exclusion simulée ou erreur, avant d'en venir à la jurisprudence sur l'exclusion de la sacramentalité : la première jurisprudence admettant l'autonomie du cas ; incidence de l'allocation du Pontife romain à la Rote en 2001 et 2003 sur la jurisprudence plus récente ; admission de la simulation partielle de la sacramentalité dans la jurisprudence la plus récente ; admission du chef d'exclusion de la sacramentalité en tant qu'hypothèse de simulation totale dans la jurisprudence la plus récente.

Enfin le professeur Héctor Franceschi étudie « le *bonum coniugum* du point de vue de la simulation et de l'incapacité » (p. 477-509). Selon lui, pour comprendre correctement la portée et le contenu du *bonum coniugum* dans la structure essentielle du mariage, que ce soit au moment fondateur du pacte que dans le mariage en tant que réalité fondée, c'est-à-dire le lien matrimonial, il est fondamental d'adhérer à une véritable vision personnaliste,

bien éloignée de la vision contractuelle et d'une vision phénoménologique et existentielle du mariage. Il convient en outre de revenir à une vision réaliste du droit, non plus comme norme écrite ou comme exigence imposée du dehors à la relation conjugale, mais comme ce qui est juste en elle, ce qui naît de la relation elle-même et est donc intrapersonnel et interpersonnel. Cette vision du réalisme juridique permette de découvrir, dans chaque cas, à la lumière de la vérité des choses, où se trouve la justice, inséparable de la vérité. Ce n'est que de cette façon que, dans les causes relatives à l'exclusion du *bonum coniugum* ou à l'incapacité d'instaurer une union ouverte à ce bien, les juges pourront vraiment accomplir leur mission, qui est celle de *ius dicere*, autrement dit de déclarer le droit, ce qui est juste. Après avoir tenté de définir le contenu du *bonum coniugum* dans une optique personnaliste, en tant que droit-devoir d'aide mutuelle et de service dans l'ordre des moyens en soi appropriés et nécessaires pour obtenir les fins du mariage et le perfectionnement mutuel, l'auteur étudie le rapport entre le *bonum coniugum* et les divers cas de simulation totale, puis souligne l'autonomie du cas d'exclusion du *bonum coniugum*, avant de préciser la preuve de l'exclusion de l'*ordinatio ad bonum coniugum* et l'incapacité pour le *bonum coniugum*.

Dominique LE TOURNEAU

Réginald-Marie RIVOIRE, *La valeur doctrinale de la discipline canonique. L'engagement du Magistère dans les lois et coutumes de l'Église*, Thèse ad Doctoratum in Iure Canonico totaliter edita, Dissertationes, Series canonica, XLVI, Romae, Edizioni Santa Croce, 2016, 308 p. — ISBN 978-88-8333-597-6 — € 15,00.

Cette thèse de doctorat sur les rapports entre la doctrine et la discipline est le fruit d'une recherche courageuse et originale. Effectivement, le sujet n'a pas encore été exploré systématiquement, du moins à la connaissance de l'auteur. En partant de l'enseignement de saint Thomas d'Aquin sur distinction entre l'objet, le sujet et l'acte, l'auteur étudie la valeur doctrinale et magistérielles des lois et des coutumes de l'Église.

Dans un premier chapitre, qui assure la mise en place du sujet, il présente quatre exemples de disciplines qui illustrent bien les difficultés d'une étude de la valeur doctrinale ou magistérielles des lois et coutumes de l'Église. Les deux premiers exemples sont bien connus et souvent débattus — le célibat sacerdotal et la dissolution du mariage *in favorem fidei*; les deux autres sont des pratiques historiques maintenant rejetées parce qu'elles véhiculaient une doctrine erronée — la torture judiciaire et la consécration eucharistique par

contact (immixtion). À l'aide de ces quatre exemples, la première partie de la thèse sert à observer objectivement les domaines de la vérité transmise et du droit, et puis des pouvoirs du magistère et du gouvernement. Tout en coexistant dans un même sujet matériel et même s'il y a bien des points d'interaction ou d'interférence, les deux objets (doctrine et discipline) et les deux pouvoirs (magistère et gouvernement) sont, en effet, bien distincts. C'est l'objet visé qui détermine quel pouvoir est engagé.

La seconde partie de la thèse, de nature démonstrative, décrit l'exercice du magistère dans la discipline ecclésiale, en commençant par son infaillibilité, au niveau maximum, et en poursuivant par les degrés d'enseignement magistériel inférieurs. L'aboutissement de l'étude illustre bien qu'il n'est pas toujours facile de déceler le droit divin révélé dans une loi ou une coutume ou d'y voir les rapports.

L'auteur conclut que le pouvoir de magistère et le pouvoir de gouvernement, bien qu'ils soient étroitement liés, sont distincts à partir de leurs raisons formelles intrinsèques : c'est une chose de commander mais c'en est une autre d'annoncer une vérité. Il suggère l'existence d'un droit « intermédiaire » — correspondant au *ius gentium* — qui, dans une herméneutique de continuité, n'a pas l'absoluité du droit divin, mais qui commande néanmoins tout en permettant des mises au point au fil des temps.

Cette monographie est certainement d'actualité. Nous n'avons qu'à penser au débat qui a suivi l'exhortation apostolique post-synodale *Amoris laetitia*, plus spécifiquement sur la question de l'admission aux sacrements des personnes divorcées et remariées. Dans sa thèse, l'auteur évite plusieurs écueils (positivisme, volontarisme, idéalisme, relativisme, autoritarisme) qui auraient pu faire échouer son projet; il a préféré prendre une approche inspirée d'un réalisme sain et rafraîchissant, ce qui assure l'équilibre et le succès de son travail.

La thèse est bien écrite, dans un langage soigné et clair, ce qui en permet une lecture facile et agréable. Elle intéressera, entre autres, théologiens et canonistes qui veulent approfondir la relation entre la doctrine et la discipline de l'Église, et la délimitation de la vérité enseignée et de la discipline ecclésiale.

Anne ASSELIN

Patrick VALDRINI avec Émile KOUVEGLO, *Leçons de droit canonique. Communautés – Personnes – Gouvernement*, préface de Philippe Levillain, Paris, Salvator, 2017, 528 p. – ISBN 978-2-7067-1549-5 – € 28,50.

Ces *Leçons*, fruit de l'enseignement de l'auteur reprennent d'une manière renouvelée les idées par lui présentée dans le Dalloz de *Droit canonique* (2^e éd.,

1999) et dans *Comunità, persone, governo. Lezioni sui libri del CIC de 1983*, ayant davantage trait aux cours donnés à l'Université pontificale du Latran. Cet ouvrage est offert comme « une présentation exhaustive, condensée et actualisée du droit de l'Église catholique tel qu'il est actuellement mis en vigueur », s'agissant des deux premiers livres du Code, des normes générales et du Peuple de Dieu.

Ce volume, conçu pour les usagers laïcs ou clercs qui participent au fonctionnement régulier des institutions ecclésiales, est, comme le titre le laisse entendre, organisé en trois parties.

La première est consacrée aux « Communautés ». La notion de communauté retenue par l'auteur est intéressante, même si elle n'est pas justifiée par les raisons que nous avançons dans notre manuel sur *Les communautés hiérarchiques de l'Église catholique*. Cette partie traite, dans une première section, de l'organisation des Églises particulières, et s'occupe successivement des Églises particulières, de la charge pastorale du diocèse, des conseils du diocèse et des paroisses et de leurs regroupements. Nous nous arrêterons seulement à une question discutée : la nature juridique des prélatures personnelles » (p. 63-70). L'auteur présente les différentes thèses émises en la matière. Il reconnaît que les normes du code et leur mise en œuvre dans l'érection de l'Opus Dei montrent que « la prélature personnelle ne peut être dite une simple association cléricale » et qu'elle appartient « au droit des communautés hiérarchiques *sans qu'elle soit une communauté hiérarchique* composée des trois éléments qui caractérisent cette dernière catégorie ». Pour le doyen Valdrini, la figure juridique de la prélature personne est « une réalisation originale, spécifique et flexible en fonction des circonstances, de la figure du chapelain. L'Église détermine une communauté de fidèles, qui nécessite une œuvre pastorale, qu'elle n'érige pas mais confie à un ou des chapelains (aumôniers) (c. 564 CIC 1983), dans le cas de la prélature personnelle, à un groupe de clercs organisé hiérarchiquement auquel peuvent se lier des laïcs par convention » (p. 70). Il s'agit au fond d'un *medium* entre deux tendances doctrinales, mais nous craignons fort qu'elle ne corresponde pas à la réalité, du moins telle qu'elle est vécue de façon institutionnalisée dans la première prélature personnelle existante, où les chapelains, précisément, n'exercent pas de pouvoir de gouvernement ou de direction, en dehors du prélat et de ses vicaires et des vicaires régionaux, ce qui fait somme toute un nombre extrêmement réduit de ses prêtres.

La deuxième section aborde les regroupements des Églises particulières, sous forme de provinces ecclésiastiques, de métropolitains et de conciles particuliers, puis des conférences des évêques. L'auteur voit dans les provinces et les conciles d'une part, dans les conférences des évêques d'autre part, des réalisations différentes de la synodalité, réalisant la collégialité

affective. Il rappelle que le pape François a souhaité que le statut des conférences des évêques soit explicité pour mettre en évidence « une certaine autorité doctrinale authentique ».

Une troisième section présente l'autorité suprême dans l'Église, qu'il s'agisse du Pontife romain et du collège des évêques ou de l'aide au Pontife romain.

La deuxième personne est centrée sur les « Personnes », c'est-à-dire les personnes physiques dans le CIC 1983, états des personnes et participation, les devoirs et les droits de tous les fidèles, les devoirs et les droits des laïcs en particulier, les personnes juridiques, les communautés associatives.

La troisième partie enfin porte sur le « Gouvernement ». Après un excursus sur fonction et pouvoir de gouvernement, pouvoir d'ordre et de juridiction, ainsi que sur la distinction des pouvoirs dans le code, les chapitres successifs traitent des offices ecclésiastiques et le gouvernement, le pouvoir de gouvernement et les offices de gouvernement, les actes juridiques, le gouvernement et les sources du droit canonique, les actes du pouvoir exécutif. À propos du pouvoir du Pontife romain, le professeur Valdrini relève que, en droit canonique, le caractère personnel de l'exercice du gouvernement « est donné pour garantir la *rationabilitas* des actes de gouvernement et leur respect de l'unité et de la communion de l'Église qu'ils promeuvent » (p. 172). Il décrit le débat doctrinal sur l'origine de ce pouvoir de gouvernement. Quant au pouvoir de la curie, il a un caractère instrumental que maintient la réforme entre prise par le pape François, laquelle réforme renforce le service rendu par la curie aux conférences des évêques (p. 215).

On relèvera un développement assez détaillé sur les notions de fidèle et de personne dans l'Église et sur les faits juridiques déterminant la condition juridique de chacun. Ceci en préalable au chapitre sur « États des personnes et participation ». Plus que d'états, nous aurions préféré voir parler de statuts juridiques distincts, mais l'auteur écrit que « l'état fait partie du *statut personnel* d'un fidèle, les autres devoirs et droits appartiennent à son *statut de fonction* » (p. 258), autrement dit ce que le concile appelle l'égalité fondamentale de tous les fidèles et la diversité fonctionnelle. Les normes sur les droits et les devoirs des fidèles ont « une place prioritaire, car elles appartiennent au statut des fidèles et forment un droit constitutif des institutions et des personnes » (p. 263). Ces droits et devoirs sont développés suivant trois critères de lecture : l'Église comme société, comme communion et comme société spécifique.

Nous relèverons à propos du phénomène associatif un paragraphe utile sur le lien entre les associations et le droit civil (p. 338-339).

L'auteur souligne une hiérarchie d'offices selon l'état clérical ou laïc, montrant la spécificité du droit canonique consistant en ce qu'il n'est pas possible d'affirmer que le code présente l'organisation de l'Église d'un point de vue purement fonctionnel. En effet, « l'organisation des fonctions ecclésiastiques n'est pas entièrement détachée de l'état des personnes, car certaines charges sont réservées aux clercs. Dès lors, les offices qui font partie de la constitution hiérarchique de l'Église ne peuvent être remplis par les fidèles indépendamment de leur état ; en conséquence, le *rapport exclusif* entre organisation de l'Église et état clérical a été abandonné mais non le *rapport* entre organisation de l'Église et état des personnes » (p. 374).

L'on notera ici ou là des suggestions. Par exemple que si les vicaires de l'évêque font partie du collège des consultants ils ne devraient pas participer aux votes portant sur un avis ou un consentement (p. 106). Les pratiques actuelles en matière de nomination des curés « introduisent un principe de mobilité générale qui transforme la nature propre de l'office » (p. 117).

L'on remarquera aussi quelques images intéressantes, comme la distinction établie par le R. P. Congar entre paroisse et diocèse (p. 115).

L'auteur a pris le parti de ne pas mettre de notes (mais quelques références sont incorporées au texte), ce qui allège sans doute la lecture, rendue d'ailleurs agréable par un style coulant et bien frappé. Mais il fournit une bibliographie générale des livres I et II tant du CIC 1917 que du CIC 1983 (p. 499-504). Un index thématique est très utilement ajouté (p. 505-508).

Dominique LE TOURNEAU

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NOTES BIOGRAPHIQUES BIOGRAPHICAL NOTES

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Père Abbass est né le 27 janvier 1952, à Sydney en Nouvelle-Écosse. Membre des Franciscains conventuels de la Province de Notre Dame des Anges, aux États-Unis, il a été ordonné à la prêtrise à Albany, New York, le 25 mai 1985. Il a poursuivi ses études universitaires à l'Université Carleton, à Ottawa, Ontario (BA, 1972), à l'Université Dalhousie, à Halifax, Nouvelle-Écosse (LLB, 1975), à St. Anthony-on-Hudson Theologate, à Rensselaer, New York (MDiv, 1985) puis à l'Institut pontifical oriental, à Rome (JCL, 1989 et JCD, 1992). Le 14 novembre 1975, il fut admis au Barreau de la Nouvelle-Écosse et eut sa propre pratique à Sydney, de 1975 à 1979. Il fut admis, le 24 janvier 1984, au Barreau de New York où il fut avocat. Il a été professeur à la Faculté de droit canonique, à l'Institut pontifical oriental, à Rome, de 1992 à 2004. Il est professeur titulaire à la Faculté de droit canonique de l'Université Saint-Paul, à Ottawa, depuis 2004.

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Monsignor John Alesandro studied at St. Thomas the Apostle School, Woodhaven; Cathedral College, Brooklyn, and Seminary of the Immaculate Conception, Huntington (B.A. magna cum laude, 1963); Gregorian University, Rome (S.T.L. cum laude, 1967; J.C.D. summa cum laude, 1971); St. John's Law School, New York (J.D., summa cum laude, 1994). Ordained to the priesthood for the Diocese of Rockville Centre at St. Peter's Basilica, Rome (1966), he was named an honorary prelate (1980) and protonotary apostolic (2002). He has served in the Diocese of Rockville Centre in various canonical offices over the past 40 years: adjutant judicial vicar, vice chancellor, chancellor, episcopal vicar, vicar for administration, vicar general, moderator of the curia, diocesan administrator sede vacante. He taught as Distinguished Lecturer at the School of Canon Law at CUA (2008-2011). He is a member of the CLSA since 1971 in which he served in various positions, including president, and he is also a member of the CTSA since 1971. He was a consultant to the NCCB's Canonical Affairs Committee for

23 years; special canonical consultant for the drafting of “Doctrinal Responsibilities;” *peritus* to the NCCB’s Delegation to the Vatican Commission on the Revision of the Code of Canon Law (1981); member of the papal joint commission on the judicial process of dismissal (1993); author of the NCCB document Sexual Misconduct and Canonical Dismissal from the Clerical State; member of the subcommittee drafting the Application of Ex corde Ecclesiae for the United States (1998). A licensed attorney in the State of New York since 1995, he served on the New York State Task Force on Life and the Law (1985-2007), and is currently adjunct professor at St. John’s Law School, Jamaica, New York, and Molloy College, Rockville Centre, New York. He has written extensively on canonical issues.

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Sister Marren Rose A. Awiti is a member of the Institute of the Blessed Virgin Mary (Loreto Sisters) of Kenyan origin. She professed her perpetual vows in 2008. She is a recent graduate of the JCD programme at Saint Paul University, Ottawa. She holds a bachelor of Education (History and Religious Studies) from Kenyatta University, Nairobi (1994); a diploma in Philosophy and in Theology (2010), a Masters degree in Religious Studies (2004), a Masters in Canon Law, all from the Catholic University of Eastern Africa, Nairobi; a Licentiate in Canon Law from Urbaniana Pontifical University, Rome (2013); and a Doctorate in Canon Law from Saint Paul University, Ottawa, Canada (2017). She has been involved in the teaching ministry, administration and formation work in her Institute. She is a member of the association of women religious canon lawyers under the UISG Canon Law Council and has presented papers on canonical issues affecting religious institutes in the recent UISG Canon Law conferences and workshops.

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Monsignor Stephen S. Doktorczyk was ordained a priest for the Diocese of Orange in California in 2005. He earned an STB from the Pontifical University of St. Thomas Aquinas in Urbe in 2004, received a JCL from the Pontifical Gregorian University in Rome in 2007, and completed doctoral studies in 2015 at the same university. His dissertation entitled “Persistent Disobedience to Church Authority: History, Analysis and Application of Canon 1371, 2°” was published in 2016. He was a parochial vicar and Defender of the Bond in his home diocese from 2007-2011, served as an Official at the Congregation for the Doctrine of the Faith from 2011-2016, and is currently the Judicial Vicar for the Diocese of Orange.

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Bishop Brian J. Dunn was born in St. John's, Newfoundland on 8 January 1955. He was ordained a priest for the Diocese of Grand Falls, Newfoundland and Labrador and served as Chancellor and Associate Judicial Vicar of his diocese. He received the J.C.L. and J.C.D. degrees at Saint Paul University, Ottawa, Ontario. He served as Assistant Professor on the Faculty at St. Peter's Seminary, London, Ontario for six years, as a lecturer for two years at the Faculty of Canon Law, Saint Paul University, Ottawa and for six years as an instructor at the Atlantic School of Theology (Halifax) in the Diploma Program for Theology and Ministry. He received an M.A. (Liturgical Studies) from Notre Dame, Indiana in 2006. He was ordained a bishop on 9 October 2008, served as Auxiliary Bishop of the Diocese of Sault Ste. Marie, ON, and became Bishop of Antigonish, NS on 25 January 2010.

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Father Alexander M. Laschuk is a priest of the Eparchy of Toronto and Eastern Canada. Education: B.F.Sc. (Windsor, 2007), B.Th./S.T.B. (Saint Paul, 2010), M.C.L. (Saint Paul, 2011), J.C.L. (Saint Paul, 2012), J.C.D., Ph.D. (Saint Paul, 2016). Judicial vicar and vice-chancellor of the Eparchy of Toronto. Adjutant judicial vicar of the Toronto Regional Marriage Tribunal. Parochial vicar of St Nicholas Ukrainian Catholic Church. Previously served as defender of the bond for the Canadian Inter-Eparchial Appeals Tribunal, promoter of justice for the Eparchy of Toronto, and promoter of justice for a delegated tribunal of the Congregation for the Causes of Saints. Member of the North American Catholic-Orthodox Theological Consultation. Sessional lecturer at Saint Paul University since 2011. Married with one child.

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Monsignor Edward M. Lohse was born in Erie, Pennsylvania in 1961 and was ordained a priest of the Diocese of Erie in 1989. From 1989 to 2000, he served in numerous assignments including parish work, high school and university work, and vocation discernment. He earned a license in canon law from the Gregorian University in 2002, after which he returned to his diocese to serve as vice-chancellor and then chancellor. From 2010 to 2015 he served at the Holy See as an official of the Congregation for the Clergy, assisting also as an adjunct faculty member of the Pontifical North American College and undertaking doctoral studies. Returning to Erie at the end of 2015, he was named episcopal vicar for canonical services and in 2016 he received his doctorate in canon law from the Gregorian University. In 2017, he was named vicar general of the Diocese of Erie.

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Father Bryan V. Pham, S.J., was born in Da Lat, Vietnam in 1975 and grew up in Portland, Oregon. He belongs to the U.S.A. West Province of the Jesuits. He holds a B.A. in Philosophy, Political Science, and Religious Studies from Gonzaga University, an S.T.B. from Regis College (Toronto), an M.Div. from the University of Toronto, a J.D. from Seattle University School of Law, a J.C.L. from the Pontifical Gregorian University, a J.C.D. from Saint Paul University, and a Ph.D. (canon law) from the University of Ottawa. An active member of the Washington State Bar Association, Canon Law Society of America, and the Canadian Canon Law Society, the author currently lives in Los Angeles, California where he is a professor of theology and canon law at Loyola Marymount University, the Catholic Chaplain at Loyola Law School, an attorney with at the Loyola Immigrant Justice Clinic, and a Judge and a Defender of the Bond with the Metropolitan Tribunal of the Catholic Archdiocese of Los Angeles.

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Father Michael Francis Rosinski, S.J., is a native of Fenwick, Ontario. He was born in 1975, entered the Jesuits in 1994, was ordained to the priesthood in 2006, and pronounced his final vows in 2015. Bacc. Phil., 1999, Milltown Institute of Theology and Philosophy (Dublin); B.A., 2000, Brock University (St. Catharines); S.T.B./M.Div., 2005, Regis College and University of Toronto (Toronto); J.C.L., 2011, Pontifical Gregorian University (Rome); J.C.D./Ph.D., 2016, Saint Paul University/University of Ottawa (Ottawa). He has served as a teacher and chaplain at both of the Canadian Jesuits' high schools in Winnipeg and Montreal with shorter pastoral assignments in Jamaica, South Sudan and at Loyola Retreat House in Guelph, Ontario. He is currently Assistant Pastor and Chaplain, St. Mark's Parish, University of British Columbia (Vancouver) and Director of Formation for the Jesuits of Canada.

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Father W. Becket Soule, O.P. graduated from Davidson College in Davidson, North Carolina before attending the Episcopal Divinity School in Cambridge, Massachusetts; he has also received degrees from the University of Dallas and Harvard University. He was ordained in the Episcopal Church in 1981, and served parishes in North Carolina, Texas, and Pennsylvania. After being received into full communion with the Catholic Church, he entered the Dominican Order and was ordained in the Catholic Church in 1993. He received the JCL (1992) and JCD (1994) from The Catholic University of

America; his work centered on the Anglo-Norman school of canonists. Father Soule has taught at The Catholic University of America, the Dominican House of Studies (Washington, DC), and Oxford University. He has been visiting lecturer and fellow at other institutions of higher studies in the United States, Great Britain, and the Ukraine, and served as an official for the Congregation for the Eastern Churches in Rome. He was named the Bishop James A. Griffin Professor of Canon Law at the Pontifical College Josephinum in January 2011, after serving as Dean of the Pontifical Faculty at the Dominican House of Studies in Washington, D.C. (2003-2007) and pastor of Saint Denis' Catholic Church in Hanover, New Hampshire (2008-2010). He has also served as Judicial Vicar and Episcopal Vicar for Canonical Affairs for the Personal Ordinariate of the Chair of Saint Peter (US and Canada).